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IN THE

# Supreme Court of the United States

OCTOBER TERM [redacted] 1969

No. [redacted] 149

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ALLIED REALTY OF ST. PAUL, INC.,

*Plaintiff,*

vs.

THE EXCHANGE NATIONAL BANK OF CHICAGO, GERTRUDE BROWN, ET AL.,

*Respondents,*

SIDNEY P. ABRAMSON,

*Petitioner.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SIDNEY P. ABRAMSON,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Sidney P. Abramson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 26, 1969.

## CITATIONS TO OPINIONS BELOW

The judgment, of the United States Court of Appeals of March 26, 1969, is yet unreported but is Nos. 19,311 and 19,321 in the United States Court of Appeals for the Eighth Circuit and is set forth in Appendix A, infra pp. A1–A8. An opinion delivered earlier in this cause by the United States District

Court for the District of Minnesota, Third Division, dated April 11, 1968, reproduced in Appendix B, infra pp. B1–B15, is reported in 283 F. Supp. 464 (1968). An earlier opinion in a companion case by the United States District Court, District of Minnesota, Third Division dated February 3, 1968, under the caption, *Exchange National Bank of Chicago vs. Abramson*, printed in Appendix C, infra pp. C1–C7, is reported in 278 F. Supp. 849 (1968).

## JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1968. By order of April 10, 1969, printed Appendix D, infra pp. D1–D2, the United States Court of Appeals for the Eighth Circuit stayed the issuance of a mandate for a period of 30 days from and after the date of such order for the purpose of the petition herein. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

## QUESTION PRESENTED

Whether a former assistant and special assistant United States Attorney who participated in a criminal prosecution should be prohibited from accepting employment as an attorney for State Court Receiver, engaged in an action against a party, not a defendant in the criminal prosecution, where some facts and evidence are common to the criminal prosecution and the State Court Receiver's civil action.

There is also presented in this case the implicit further question to-wit: Whether absent a showing of conflicting interest, use of confidential information, or unfair advantage, an attorney should be proscribed from using his experience and knowledge for a willing client in his chosen profession of endeavor.

## PROVISIONS INVOLVED

Canon 36, American Bar Association Canons of Professional Ethics, provides:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

## STATEMENT OF THE CASE

This cause was commenced in September, 1965, after appointment of Homer A. Bonhiver, by the Minnesota District Court as Receiver of the American Allied Insurance Company. From April 1963, through and including December 15, 1966, petitioner was an Assistant United States Attorney for the District of Minnesota. Thereafter, while in private practice, petitioner was employed as a Special Assistant United States Attorney to assist in the prosecution of a number of persons, not including respondent, Exchange National Bank, indicted for fraud in connection with the "so-called American Allied Insurance Company Case." Petitioner participated as a Special Assistant United States Attorney in the fraud trial from March to June, 1967.

On November 21, 1967, the District Court of Minnesota, upon the Petition of the Court appointed Receiver, Homer A. Bonhiver, authorized the employment of Petitioner as attorney to act for Receiver in the instant action and one other action not then in suit against the Exchange National Bank of Chicago. Petitioner undertook representation of the Receiver, drafted Complaints, entered negotiations with the Bank's attorneys and was involved in a certain letter agreement be-

tween the bank and the Receiver, delaying suit pending negotiations.

On January 25, 1968, the Bank commenced an injunction suit against Petitioner based upon the alleged unethical conduct of Petitioner. Such relief was sought in the companion case (United States Court of Appeals, Eighth Circuit No. 19188). The Bank's motion for preliminary injunction was denied by the District Court (the District Court's opinion is printed in Appendix C, pp. C1–C7.

Thereafter, in the instant and related action, Allied Realty of St. Paul, Inc. on the 11th day of May, 1968, moved the United States District Court for its Order declaring that Petitioner had been guilty of no unprofessional or unethical conduct and might continue to fulfill his obligations as counsel for Allied Realty of St. Paul, Inc., pursuant to the Order of the District Court of Ramsey county, Minnesota. On April 11, 1968, the District Court entered its Order enjoining Petitioner from acting as counsel for the Court Receiver, Homer Bonhiver, against the Exchange National Bank. The District Court's opinion is Appendix B, pp. B1–B15. Intervention by your present Petitioner was allowed, and appeal taken, and the affirmance of District Court Order of April 11, 1968, by the United States Court of Appeals for the Eighth Circuit on March 26, 1969, is the subject of this petition.

The basis of Federal jurisdiction in the instant case, *Allied Realty of St. Paul, Inc. v. The Exchange National Bank of Chicago et al.*, was a mortgage foreclosure action brought in the District Court of Ramsey County, State of Minnesota, August 5, 1965, by Allied Realty of St, Paul, Inc. Thereafter an action was commenced on September 17, 1965, by Allied Realty of St. Paul, Inc., against the Exchange National Bank of Chicago, seeking to set aside the purported mortage be-

tween Exchange National Bank of Chicago and Allied Realty of St. Paul, Inc. on property located in the State of Minnesota on the grounds of fraud. Thereafter, on October 7, 1965, Exchange National Bank of Chicago filed a petition for removal from the District Court of Ramsey County, Minnesota, and posted appropriate bond in accordance with 28 U.S.C. 1441 et seq.

## REASONS FOR ALLOWANCE OF THE WRIT

### I. Conduct of Petitioner, Sidney P. Abramson, Is Not in Violation of Canon 36 of the American Bar Association Canons of Professional Ethics.

Canon 36 was proposed by a Special Committee established in 1924 by the American Bar Association to supplement the then existing Canons of Professional Ethics. Specifically Canon 6 of the Canons of Professional Ethics of the American Bar Association provides in substance that it is unethical to accept employment which would constitute a conflict of interest. Canon 36, in substance, provides that information previously received in confidence from a client must not be disclosed without that client's consent.

In a noteworthy comment at 70 Harvard Law Review 657 (1957) entitled *The Former Government Attorney and the Canons of Professional Ethics* by Judge Irving R. Kaufman, subsequent to his decision in *United States vs. Standard Oil*, 136 F. Supp. 345 (SDNY 1955) where he refused to disqualify a former government attorney, at the instance of the government, Judge Kaufman stated at page 660:

> "Canon 36 was designed to supplement the other two (Canon 6 and 36) not to replace them. Moreover since it has been established that the appearance of evil doctrine

applies to Canon 36, and since disregard of the obligations derived from Canons 6 and 37 would probably create an appearance of evil, the former government attorney must look to those canons and the decisions based on them before he can find his career."

In *United States vs. Standard Oil Co.*, 136 F. Supp. supra at p. 367, Judge Kaufman stated:

"When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine, and must be so marked."

The Court of Appeals' affirmance of the lower Court's decision has departed from previous decisions relating to the former government attorney as to necessitate an exercise of the Supreme Court's power of supervision over lower courts.

Canon 36 has previously and properly been utilized to disqualify an attorney, as in opinion 135 of March 16, 1936, of the American Bar Association Committee of Ethics prohibiting the prosecuting attorney from engaging in a civil action based on substantially the same facts which in his official capacity he investigated for the purpose of determining criminal responsibility. Likewise in *Hilo Metals Company vs. Learner Co.*, 258 F. Supp. 23 (D.C. Hawaii 1966), an attorney was disqualified where as assistant chief trial attorney for the United States Department of Justice, in a trust division, he instigated an investigation against Learner Co., resulting in criminal actions brought under the Sherman Act and a civil action under the Clayton Act. The attorney left the government and commenced the action on behalf of a private client, against Learner Co., the same defendant who had been involved in the prior government action. The attorney had interviewed the principal defendants while with the government and had ac-

cess to all of the files and acknowledged that the private civil action was "a continuation of the prior government action."

In the instant matter, Petitioner Abramson (1) was not retained to commence an action against the same or similar parties, to-wit: The defendants in the criminal action, and such defendants are not objecting or seeking Petitioner's disqualification. (2) The issue of fraud on the part of the defendant Bank was in no way involved in the criminal trial and the result in the criminal action in no fashion could bind the respondent Bank. (3) The respondent Bank, a quasi public institution, was only involved in the criminal trial as a witness responding to subpoenas duly issued by the Government and would be similarly compelled to respond at the instance of any attorney who has reviewed the 17,000 pages of transcript resulting from the criminal trial. (4) There is no allegation or showing that any documents or confidential communication was made between the respondent Bank and Petitioner.

(5) Finally, neither the opinion below nor the Court of Appeals' decision affirming that opinion took into account the "Community's Legal Mores". Judge Kaufman in his comment in the Harvard Law Review, supra, states at 70 Harvard Law Review p. 665:

> "Since the matter (*U.S. vs. Standard Oil Co.*) involved the appearance of evil rule, which received its content from the communities' legal mores, I did not rely solely on my own impressions of what those mores were. I informed both the Association of the Bar of the City of New York and the New York County's Lawyers Association that I would welcome amicus curiae briefs on the ethical-legal problem involved. . . ."

In the instant matter witness Hyam Segell, former assistant United States Attorney and at the time of the hearing herein president-elect of the Ramsey County Bar Association was the sole witness on the subject of the "legal mores" of Petitioner's community. He stated in answer to a hypothetical question framing the issue herein that there was no violation. (Testimony of witness Segell set forth in Appendix E herein, pp. E1–E13.

The lower court's order, affirmed by the United States Court of Appeals of the Eighth Circuit, drastically and unfairly expands the principle of Canon 36 to a situation which has not an "appearance of evil" and the Order allows an unwarranted restriction of a lawyer's right to practice law to the benefit and at the hands of an adverse party.

## CONCLUSION

For all the foregoing reasons, Petitioner asks that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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St. Paul, Minnesota

# APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 19,311

ALLIED REALTY OF ST. PAUL, INC.,
*Plaintiff,*

vs.

EXCHANGE NATIONAL BANK OF CHICAGO, ET AL.,
*Defendants-Appellees,*

SIDNEY P. ABRAMSON,
*Intervenor-Appellant.*

No. 19,321

EXCHANGE NATIONAL BANK OF CHICAGO,
*Defendant-Appellant,*

vs.

ALLIED REALTY OF ST. PAUL, INC.,
*Plaintiff,*

SIDNEY P. ABRAMSON,
*Intervenor-Appellee.*

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[March 26, 1969]

Before Van Oosterhout, Chief Judge; Mathes and Bright, Circuit Judges.

Van Oosterhout, Chief Judge.

This is an appeal by intervenor Sidney P. Abramson from final order determining that Mr. Abramson is disqualified by reason of Canon 36 of the American Bar Association Canons of Professional Ethics from serving as an attorney for the plaintiff in *Allied Realty of St. Paul v. The Exchange National Bank of Chicago, et al.*, pending in the trial court. Plaintiff has not appealed from the disqualification order. Defendants have cross-appealed from the refusal of the trial court to extend the disqualification order to enjoin the use by the plaintiff of information obtained and services performed by Mr. Abramson and the refusal to extend the disqualification to other attorneys representing the plaintiff.

The trial court in a memorandum opinion supporting its order, reported at 283 F. Supp. 464, fully and fairly states the issues, the pertinent facts and the basis of its decision. We affirm the trial court's decision both upon the appeal and the cross-appeal for the reasons hereinafter stated.

A brief summary of the extensive background facts appears to be necessary to put the issues before us in proper focus. Plaintiff Allied Realty brought this action to set aside as fraudulent a mortgage it had given to the defendant bank. Such action has been pending since 1965 and was commenced prior to Mr. Abramson's appointment as attorney for the plaintiff. Plaintiff is a wholly owned subsidiary of American Allied Insurance Company. In 1965 the Minnesota federal grand jury returned an indictment against numerous individuals including three former employees of defendant bank for alleged criminal activity which brought about the failure and insolvency of Allied Insurance Company. Upon change

of venue, the indictment was prosecuted in North Dakota. After a trial of thirteen weeks, all defendants were acquitted. Abramson, who had previously served as assistant United States Attorney, accepted employment as a Special Assistant United States Attorney to assist in the preparation and trial of the criminal case and actively participated in the investigation and the trial. The trial court upon the basis of a transcript of a portion of the record of the criminal trial, which was introduced in evidence, found:

> "These pages indicate that the government in the criminal trial attempted to show, through a series of exhibits, the mortgage transaction involving the Minnesota real estate, the subject of the present case. Neither the Receiver nor Abramson argue that this mortgage is not the same mortgage as the one involved in this case nor that such evidence was not adduced in the criminal trial. Abramson in fact reviewed many documents with officers of defendant Bank in preparation for trial, including the aforesaid mortgage documents.
>
> "Abramson does not contend that he did not marshal the documents relevant to the Minnesota mortgage transaction. Indeed, his statement which is very frank that he saw every Bank document put in evidence, coupled with the transcript showing Bank records being introduced, compels the conclusion that Abramson passed upon them with more than a mere summary perusal. Additionally, Abramson questioned Bank employees and participated in numerous pretrial procedures." 283 F. Supp. 464, 467.

As the trial court's opinion shows, Mr. Abramson was appointed as an additional attorney for the plaintiff with the approval of the state court administering the receivership largely on the basis of relevant knowledge he had acquired in

the criminal case. He subsequently caused an amendment to the complaint to be filed which was stated to be based on information available from the criminal case previously unknown to the plaintiff.

The American Bar Association Code of Ethics has been adopted by the Supreme Court of Minnesota as a standard of professional conduct. Mr. Abramson spends considerable space in his brief to establish that he did not violate Canon 6 (conflicting interests) and Canon 37 (confidential information). There is no claim made in the present litigation that either of such canons was violated. Canon 36, the canon upon which the court based Mr. Abramson's disqualification, reads:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

The trial court in its opinion has clearly and convincingly demonstrated that Mr. Abramson's representation of the plaintiff in the present case is proscribed by Canon 36. Although Mr. Abramson's services as a government attorney had been completed and terminated prior to his employment as an additional attorney by plaintiff, he clearly falls in the category of having been in government employ and it is established as determined by the trial court that while so employed, he investigated and passed upon matters involved in the present litigation.

Upon the facts before us, *Hilo Metals Co. v. Learner Co.*, D.C. Hawaii, 258 F. Supp. 23, and opinions 135, 49, 37 and 26 of the American Bar Association Committee on Professional Ethics, all of which are quoted or referred to in the trial court's opinion, support the conclusion reached by the trial

court that Canon 36 requires the disqualification of Mr. Abramson as an attorney for the plaintiff.

We agree with the statement of defendants' counsel, endorsed by the trial court, that the breach of Canon 36 was inadvertent. Such determination has no bearing upon the result. The trial court held:

> "[T]he court believes that on a policy basis, it cannot make a subjective determination each time a similar situation arises and that in general a prohibition should visit ex-government attorneys who have been involved with particular matters and later contemplate private civil employment in the same matters." 238 F. Supp. 464, 469.

In *United States v. Trafficante*, 5 Cir., 328 F. 2d 117, 120, the court, in upholding a disqualification of an attorney who had been previously employed by the government, states:

> "It is not necessary, in order that disqualification result from a prior employment, that it be shown that the attorney acquired knowledge while representing the prior client which could operate to his disadvantage in the subsequent adverse representation. 5 Am. Jur. 297-298, Attorneys at Law, §66.
>
> "The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' 1 Thessalonians 5:22."

The court upon the record properly determined that Canon 36 disqualifies Mr. Abramson from representing the plaintiff in this case.

Upon cross-appeal, defendants urge the court erred in re-

fusing their request to extend the order entered in the following respects: (1) To Abramson's agents, servants, employees and attorneys, and all persons in active concert or participating with him; (2) to the use, by others than Abramson, of evidence, knowledge or information examined or obtained by Abramson; (3) to the commencement of any action (except by Abramson) against the Bank based upon pleadings prepared by Abramson or based upon information and knowledge gained by Abramson in the course of his public employment; and (4) to the amended Complaint in this proceeding prepared and filed by Abramson, which the Bank asked to be expunged from the files.

With respect to item (1), there is no evidence that any person acting for plaintiff is an agent, servant or employee of Mr. Abramson. Likewise, there is no proof that any other attorney representing the plaintiff in the case is a partner of Mr. Abramson's or that Mr. Abramson will directly or indirectly derive any financial benefit out of the fees paid by the plaintiff to any other person. As previously pointed out, this action was commenced prior to Mr. Abramson's appointment by other attorneys representing the plaintiff. We find nothing in the plain language of Canon 36 which would indicate that it is designed under ordinary circumstances such as here to reach beyond the attorney who previously held public office. The purpose of the Code of Ethics is to prescribe standards of conduct for attorneys. Such purpose with respect to Canon 36 is served by the disqualification of Mr. Abramson. The canon makes no provision either directly or by fair implication for abridging any right of the plaintiff or any other attorney who does not share fees with the disqualified attorney. The Code of Ethics applies generally to attorneys, not to litigants. Absent a fee sharing arrangement with the former public of-

ficial, neither the plain words nor the policy underlying the canon requires that unrelated attorneys be barred from their right to represent the plaintiff.

With respect to item (2), the use of knowledge or information obtained by Mr. Abramson in his public official capacity, Canon 36 unlike Canons 6 and 37 contains no prohibition against disclosure of information obtained while a public servant. The canon on its face would not prohibit a former official from gratuitously passing on nonconfidential information which he obtained as a public official to an interested party. The purpose of the canon appears to be to prohibit an attorney from gaining financial advantage through the use of information which he obtained as a public official.

The record in the case before us shows that the information in controversy appears in the record of the criminal trial and that the information is not confidential. The United States Attorney filed an affidavit stating that he perceived no conflict of interest in the present situation and that the evidence used would be contained in the exhibits and the transcript of the criminal trial and in other public documents.

Defendants in their brief expressly disclaim any violation of Canons 6 and 37, which deal respectively with conflict of interest and disclosure of confidential information.

*United States v. Mahaney*, N.D. Cal., 28 F. Supp. 463, principally relied upon by the defendants in support of their cross-appeal, affords no support for defendants' position. That case involved an admitted violation of Canon 6 and the court found that confidential information obtained while in public employment was wrongfully disclosed.

Our discussion of item (2) fully applies to items (3) and (4). No sound basis exists for denying plaintiff the right to commence any appropriate action against the defendants

which it chooses to bring and no reasonable basis exists for depriving the plaintiff of the benefit of any pleadings which Mr. Abramson may have prepared. The issue of Mr. Abramson's right to compensation for services performed before the disqualification order is not before us.

Defendants have wholly failed to establish that the trial court abused its discretion in refusing defendants the additional relief sought beyond the disqualification of Mr. Abramson as an attorney in the case.

The judgment is affirmed both on Mr. Abramson's appeal and defendants' cross-appeal.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

# APPENDIX B

United States District Court
District of Minnesota
Third Division

No. 3-65 Civ. 309

ALLIED REALTY OF ST. PAUL, INC.,

*Plaintiff,*

vs.

EXCHANGE NATIONAL BANK OF CHICAGO; GERTRUDE BROWN, PHILLIP KITZER, SR. AND HELEN KITZER, HIS WIFE, AND PHILLIP C. KITZER AND HELEN KITZER, HIS WIFE,

*Defendants.*

## ORDER

(April 11, 1968)

Reported at 283 F. Supp. 464 (1968)

The above-entitled matter came on for hearing before the undersigned, a judge of this court, at St. Paul, Minnesota, on March 25, 1968, on the motion of the plaintiff, Allied Realty of St. Paul, Inc., for an order declaring (1) that its attorney, Sidney P. Abramson, "has been guilty of no unprofessional or unethical conduct" in representing the plaintiff; (2) that Sidney P. Abramson may act according to an order issued by a Ramsey County district court appointing him as counsel for the plaintiff; and (3) that the Receiver for the plaintiff is not in any manner prejudiced or otherwise disabled from prosecuting the above-entitled matter against the defendant herein. Defendant, Exchange National Bank of Chicago, moved the court for an order (1) declaring that Sidney P. Abramson

acted and is acting in violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association; (2) restraining and disqualifying Abramson, his agents, servants, employees, associates and all persons in privy with him and others from (a) acting as counsel in any action against the Exchange National Bank involving claims raised as subject matter in a prior official United States Government investigation and prosecution; (b) using information, documents or knowledge learned, examined or obtained by Abramson as an Assistant or Special Assistant United States District Attorney; and (c) filing a lawsuit styled "draft complaint" attached as Exhibit D to a complaint in *Exchange National Bank of Chicago v. Sidney P. Abramson,* No. 3-68 Civ. 24 (D. Minn.) involving allegations in said complaint and prepared by or with the assistance of Abramson; and (3) expunging the complaint in this action as amended November 24, 1967. Appearing for the plaintiff in support of the motion were Briggs & Morgan by David Forsberg, First National Bank Building, St. Paul, Minnesota together with Sidney P. Abramson, Esq., 1001 Degree of Honor Bldg., St. Paul, Minnesota. Appearances for the defendant were by Best, Flanagan, Lewis, Simonet & Bellows by Harold Evarts, Esq., 1200 First National Bank Bldg., Minneapolis, Minnesota; D'Ancona, Pflaum, Wyatt & Riskind by Edgar Bernhard, Esq., 33 North LaSalle Street, Chicago, Illinois; Raskin, Downing & Dammann by Merrill A. Freed, Esq., 105 South LaSalle Street, Chicago, Illinois. The parties stipulated into the record that the evidence upon which the court may base its findings includes all of the records, files, exhibits and evidence in a certain proceeding related to the issues herein which was brought before this court in a case entitled *Exchange National Bank of Chicago v. Sidney P. Abramson,* No. 3-68 Civ. 24 (D. Minn.).

The court has examined the pleadings, motion papers, accompanying affidavits and testimony properly before it, and has read and examined the briefs submitted by the respective parties. On the basis thereof, and on the basis of all of the files, records and proceedings herein,

IT IS ORDERED That the motion of the plaintiff be, and the same hereby is denied as to parts (1) and (2) thereof and granted as to part (3) thereof.

IT IS FURTHER ORDERED That the motion of the defendant Bank is granted as to part (1) thereof, denied as to part (2) thereof except that the same is granted as to Sidney P. Abramson individually, and denied as to part (3) thereof.

Dated: April 11, 1968.

PHILIP NEVILLE
United States District Judge

---

Neville, District Judge.

Involved here is the applicability of Canon 36 of the American Bar Association Canons of Professional Ethics, which Canons were adopted by the Minnesota Supreme Court May 2, 1965 as standards of professional conduct. The canon provides in relevant part:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Plaintiff by motion seeks declaratory relief that a lawyer, Sidney P. Abramson, whom it has engaged as one of its counsel in this case, by so acting neither has nor is engaged in unprofessional or unethical conduct. Defendant seeks an order

to the contrary, barring Abramson's serving in such capacity and requesting other relief.

A related matter has been before this court before. *Exchange Nat'l Bank v. Abramson,* No. 3-68 Civ. 24, —— F. Supp. —— (D. Minn. February 3, 1968). The question herein was not squarely met in that case, though on review the Court of Appeals rendered the matter moot by holding this court to be without jurisdiction. *Exchange Nat'l Bank v. Abramson,* No. 19,188, 8th Cir., February 15, 1968.

A brief history is necessary. In 1965 the Federal grand jury sitting in Minnesota returned indictments against some 14 or more individuals for alleged criminal activity growing out of the failure and ultimate insolvency of American Allied Insurance Company. Three of the former employees of defendant Bank were among those so indicted. The plaintiff in this case, Allied Realty of St. Paul, Inc., is a wholly owned subsidiary of said Allied Insurance Company. At the time of the indictments, Abramson was employed full-time as an Assistant United States Attorney for the District of Minnesota, though he had little or nothing to do at that time with the handling of the indictments. He resigned as an Assistant United States Attorney in late 1966 to enter the private practice of law. A month or so later he was requested to return to government employ solely to become a Special Assistant United States Attorney to aid and assist in the preparation and act as "second chair" in prosecuting the criminal trials. The actual trial being removed to Bismarck, North Dakota on defendants' motion for change of venue lasted 13 weeks and is now embodied in some 17,000 pages of transcript. The trial proceeded only against those who were regarded by the government as the principal defendants, including Phillip Kitzer, Sr. and Phillip C. Kitzer, who are also defendants in this action and alleged

to have been at all times here relevant the principal owners and officers of American Allied Insurance Company and the principal officers of plaintiff herein, Allied Realty. The trial resulted in jury verdicts of not guilty as to each of the defendants then on trial including the Kitzers. The indictments as to the other defendants, including the three former employees of defendant Bank, were thereupon dismissed. Abramson's service with the government ceased shortly thereafter pursuant to his own wish.

In 1965, prior to the federal indictments, a Receiver for the affairs of American Allied Insurance Company had been duly appointed by the Minnesota State District Court in Ramsey County. The present action above-entitled in fact was commenced prior to the return of the federal indictments, and is an action seeking to set aside a claimed fraudulent mortgage on Minnesota real estate issued by plaintiff Allied Realty Company and running in favor of the defendant Bank. It appears that this claim of a fraudulent mortgage as to this transaction was involved and asserted at some stage in the 13 week criminal trial at Bismarck, North Dakota. It is asserted in the complaint in this case, that the Kitzers, as principal officers and directors of plaintiff engineered the claimed fraudulent mortgage or mortgages and certain other transactions.

In connection with his activities at the criminal trial, Abramson is very frank to admit that he was intimately associated on the Government's side with the trial of the criminal case and sat through the entire trial. He became aware of, or certainly had access to, various FBI and postal inspectors' written and oral reports and had knowledge of, and available to him, the grand jury minutes and all grand jury and government exhibits. He assisted extensively in the trial preparation. Prior to the institution of the criminal ac-

tion by the federal government, a number of plaintiff's records were subpoenaed and submitted to or used before the indicting grand jury. Many of the same documents, however, and perhaps others were actually used in the criminal trial. It was some several months after completion of the criminal trial that the Receiver for American Allied Insurance Company requested Abramson to associate himself as one of the counsel in this case. The Receiver did this for the reason, as set out in his petition to the District Court of Ramsey County, Minnesota, that:

> "The employment of Mr. Sidney P. Abramson as special counsel in these matters should, in the opinion of the petitioner, be generally advantageous to the receivership estate and should likewise result in substantial over-all saving of legal time and expense to the estate by virtue of the extensive knowledge and background Mr. Abramson now has in respect to matters particularly relating to the Exchange National Bank of Chicago as a result of his participation as Special Assistant to the United States Attorney in the criminal trials recently concluded at Bismarck, North Dakota, involving the trial of certain former officers of American Allied Insurance Company and Allied Realty of St. Paul, Inc."

The Receiver employed Abramson, pursuant to the order of the Ramsey County court as special counsel (1) to associate himself as attorney in this case and (2) to institute a new action to recover funds from this defendant for other matters and various transactions. The latter case, while still in the threatened stage and before actual service of any complaint was challenged by a separate suit brought by the defendant Bank in this court. It was in this separate suit, the object of which was to enjoin the Allied Receiver from the bringing of

a threatened suit so long as Abramson represented him, that the Court of Appeals held the jurisdictional amount of $10,000 was lacking. Such a jurisdictional lack cannot, it seems to this court, be asserted or claimed in the present proceeding which is not a separate suit solely to challenge Abramson, but is a motion in a presently pending suit (which itself clearly involves more than the jurisdictional minimum) to bar Abramson's association as counsel for plaintiff.

It should be clearly noted that this is not a case wherein an attorney leaves the government employ and becomes retained by the person or company against whom the government has been proceeding. Such would be "switching of sides" in direct contravention of Canon 6 of the aforesaid Canons. No such charge is here made. The position Abramson now takes is consistent with and not adverse to the one he took while with the government.

Nor does the situation at hand involve Canon 37 which prohibits the disclosure of the client's private and confidential information, for there has been filed with this court a full consent to Abramson's proceeding in this matter, signed by the United States District Attorney for the District of Minnesota.

In its brief, counsel for defendant says of Abramson:

> ". . . both informally in Your Honor's Chambers, and on the record at the hearing on our motion for preliminary injunction, we made clear that we are not only *not* attacking the Defendant's character or integrity but we are saying affirmatively that we are satisfied—as no doubt the Court is satisfied—that Mr. Abramson's breach of Canon 36 was inadvertent." (emphasis added)

The court quite agrees with and endorses this statement.

The question then comes down to whether an attorney who has "investigated" or "passed upon" a particular matter while

in the government employ may avail himself, after his government service, of a private legal retainer which involves not just his experience, knowledge and expertise acquired while in the government employ, but involves the use of his knowledge of a particular case or proceeding. It is this latter which makes Abramson's employment particularly valuable to the Receiver in this case, and which this court feels it necessary to condemn. Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter—for which the government paid him while he was learning it and for which now the client who employes him theoretically will not have to pay. This, it seems, is the situation in the present case and exactly the type of involvement which Canon 36 was designed to prevent.

The distinction attempted to be made that Abramson technically did not "investigate" or "pass upon" within the meaning of Canon 36 is tenuous, when it is considered that he devoted many hours to preparation for trial and spent the 13 weeks in the court room substantially every day if not every day assisting at trial. Such activity certainly is within the pale of Canon 36.

Five pages from the lengthy criminal trial transcript were

introduced and received at the hearing before this court. These pages indicate that the government in the criminal trial attempted to show, through a series of exhibits, the mortgage transaction involving the Minnesota real estate, the subject of the present case. Neither the Receiver nor Abramson argue that this mortgage is not the same mortgage as the one involved in this case nor that such evidence was not adduced in the criminal trial. Abramson in fact reviewed many documents with officers of defendant Bank in preparation for trial, including the aforesaid mortgage documents.

Abramson does not contend that he did not marshal the documents relevant to the Minnesota mortgage transaction. Indeed, his statement which is very frank that he saw every Bank document put in evidence, coupled with the transcript showing Bank records being introduced, compels the conclusion that Abramson passed upon them with more than a mere summary perusal. Additionally, Abramson questioned Bank employees and participated in numerous pretrial procedures.

In November, 1967, after his appointment, Abramson moved the court to amend the civil complaint on the ground "that information available to plaintiff as the result of a proceeding entitled *United States v. Phillip Kitzer, Sr., et al.*, concluded in June of 1967, produced information thereto unknown to the plaintiff bearing upon the facts of the above-entitled matter." While it is true that the realty transaction was not one of these transactions set out in the criminal indictment, nevertheless, evidence thereof was adduced at that trial. In sum, the court holds that the mortgage transaction constituted at least a part of the subject matter of the criminal trial and that Abramson, as Special Assistant United States Attorney, "investigated" and "passed upon" such matters within the meaning of Canon 36.

Defendant Bank submits that *Hilo Metals Co. v. Learner Co.*, 258 F. Supp. 23 (D. Ha. 1966) dealt with an identical factual situation and should be followed here. Abramson, on the other hand, suggests that *Hilo* is distinguishable on several grounds, and in any event argues that it reaches an unwarranted result. In *Hilo*, an attorney had been employed by the Justice Department, Antitrust Division, and had actively engaged in the investigation and prosecution of criminal antitrust actions against the Learner Company. After retiring from the Justice Department, he accepted employment with Hilo Metals Co., Ltd., for the purpose of prosecuting on its behalf a private treble damage antitrust suit against the same defendant, the Learner Company. Defendant contended that the attorney had violated Canon 36 and should be disqualified. The court so held.

Since the court has found that Abramson investigated and passed upon the subject matter of the realty transaction involved in this case, the *Hilo* decision is highly persuasive authority. Abramson attempts to distinguish the instant circumstances on several grounds. First, it is argued that defendant Bank was not a defendant in the criminal action, but simply occupied the status of a witness; Second, the Bank is quasi-public, and therefore it should not be permitted to argue that it would not have turned its records over to Abramson but for the official position he then held; Third, the Receiver now employing Abramson is also quasi-public and should not be penalized against the public interest; Fourth, Abramson was in only an insignificant role as Special Assistant and therefore could not use his authority to prepare the case to benefit a subsequent private client; and Fifth, the action herein is not a continuation of the criminal matter in any respect whatsoever, unlike the *Hilo* case. The court acknowledges that the above contentions are for the most part true, but does not believe that such

constitute legally significant distinctions from *Hilo*. This view is taken because the policy behind Canon 36 and the *Hilo* case is not altered in any respect by the distinctions asserted by Abramson. That policy is best articulated in conjunction with a discussion of Canon 36 set out by Judge Kaufman in *The Former Government Attorney and the Canons of Professional Ethics*, 70 Harv. L. Rev. 657 (1957), which is perhaps the only comprehensive discussion of Canon 36 available in the literature.

Judge Kaufman observes that Canon 36, in conjunction with Canons 6 and 37, have two broad and basic purposes. First, they seek to protect a client's confidential communications. Second, they attempt to avoid an "appearance of evil." It is true that neither confidentiality nor conflicting interests are here involved. Canon 36 does not speak in terms of either. Both Canon 36 and the *Hilo* decision applying it are justified on the "appearance of evil" rationale if for no other reason.

When a government attorney resigns and enters private law practice if he is permitted to seek employment in a matter which he has previously handled for the government, he is in a position either to charge a client a fee because of his knowledge acquired through his former office, in which event he is then being remunerated twice in essence, or if he does not charge a fee therefor, the private litigant fortunate enough to obtain his services places the adverse party as a disadvantage both economically and strategically. Even when neither of these results transpire, there is certainly "an appearance of evil" which this court finds justifies the disqualification of such attorneys.

*United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D. N.Y. 1955) is the decision which apparently precipitated Judge Kaufman's article in the Harvard Law Review. Judge

Kaufman wrote the opinion in that case, holding that the government must prove that an ex-government attorney investigated or passed upon the subject matter involved to justify disqualifying him in a subsequent civil suit. Although the case is inapposite to the instant facts, because it involved representation without the approval of the United States government, Judge Kaufman noted another possible "appearance of evil" prevalent in these circumstances. He referred to H. S. Drinker, *Legal Ethics* p. 130, where the problem is discussed of preventing "even the appearance that the government servant may take a certain stand in the hope of later being privately employed to uphold or upset what he had done." 136 F. Supp. at 359. A rule of law permitting government attorneys to seek employment after retirement dealing with identical subject matter would permit the argument that while in the pubic employ they investigated and prosecuted only those matters conducive to successful civil employment later. There is absolutely no evidence that Abramson in the instant matter, intended to so aid his practice in working as Special Assistant, but the "appearance of evil" so detrimental to the profession appears to be present. Again the wisdom of Canon 36 and the *Hilo* decision is shown.

As *United States v. Standard Oil Co., supra,* was inapplicable to the instant case, so is *United States v. Mahaney,* 27 F. Supp. 463 (N.D. Cal. 1939), which is another decision dealing with advocacy of conflicting interests without permission of the former government client. Only the *Hilo decision* bears directly on the facts at bar. Because of the policies behind that decision as pointed out above, the court follows that case.

The defendant Bank also points to Opinion 135 of the American Bar Association Committee on Professional Ethics

and Grievances as authority for its position. In that opinion the Committee condemns a practice whereby a public prosecutor accepts employment from one of the parties to an automobile accident case after investigating the case from a criminal standpoint for the State and declining to prosecute. The rationale used by the Committee noted the coercive effect that a prosecutor may have on private individuals he interviews and may lead them to divulge information that could be used in a civil action. The opinion reads in part as follows:

> "If the lawyer making the approach does so under sanction or color of official power, he thereby more certainly disqualifies himself from later participation as counsel in any civil litigation having its basis in or connected with the occurrence previously investigated as to its potential criminal aspects.
>
> "A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Public policy forbids. Aldridge vs. Capps, 56 Okla. 678, 156 P. 624."

The Bank contends that the same rationale is available in this case, though Abramson argues in effect that here the Bank is such a sophisticated witness that it was in no fashion coerced by the government. While Abramson may in fact be correct in his analysis, the court believes that on a policy basis, it cannot make a subjective determination each time a similar situation arises and that in general a prohibition *should visit* ex-government attorneys who have been involved with particular matters and later contemplate private civil employment in the same matters. The same finding is true with regard to numerous other minute distinctions counsel attempts to show to distinguish the instant case from *Hilo* and the policy of Canon 36. A quote from *Hilo* is appropriate:

"The philosophy of Canon 36 was well stated by the Committee in its opinion No. 49. With particular reference to that portion of the canon here involved. the opinion reads:

. . .

'In *Opinion 26*, we stated that the second paragraph of the canon:

> was intended to forbid a lawyer accepting private legal employment in any matter involving the same facts as were involved in any specific question which he had previously investigated while in public office or public employ.

and, in *Opinion 37*, when referring to *Opinion 26*, we stated:

> The basis of this decision was that as a public legal official he was acting for the state, and he should not later accept any private employment in the same matter (*whether for or against his former opinion or position*), on account of the manifest possibility that his action as a public legal official might be influenced (or be open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or upset what he had done.' (Emphasis added.)"

Under the above interpretations of Canon 36 and the present state of the case law, Abramson must be disqualified as an attorney in this matter.

Defendant, in its counter motion, has requested an order restraining and enjoining Abramson and "his agents, servants, employees and attorneys, and all persons in active concert or participating with him" from:

(a) participating further as counsel in this case;

(b) using evidence, knowledge or information examined or obtained by Abramson in connection with this and any other litigation; and

(c) commencing any action against defendant Bank in the United States District Court in Chicago, Illinois.

As to (a) above, the court does not feel it has authority, nor is the court inclined, to enjoin or remove other attorneys for the Receiver from continuing so to serve in this or any other case.

As to (b) above, there is no showing that plaintiff intends to use anything but documents, testimony and information that have become public by virtue of inclusion in the aforesaid 13 week criminal trial at Bismarck plus any documents and information that could normally be discovered from defendant or others by discovery proceedings under Rules 26 through 37 of the Federal Rules of Civil Procedure. The court therefore does not suppress or deem "tainted" or "immunized" any of plaintiff's intended proof at the trial even though such may have been "examined or obtained" by Abramson.

Relative to (c) above, the Receiver certainly is free to commence any action it desires, and such is not being enjoined by this court. The court does not wish in any way to prohibit the Receiver from continuing this lawsuit nor endeavor to thwart his prosecution of any other lawsuit in any fashion, except for the disqualification of Abramson. Again, the court by this decision does not impugn in any way Mr. Abramson's character or integrity.

A separate order has been entered herein in accordance with the views expressed in this opinion.

# APPENDIX C

United States District Court
District of Minnesota
Third Division

No. 3-68 Civ. 24

EXCHANGE NATIONAL BANK OF CHICAGO,
a national banking association,

*Plaintiff,*

vs.

SIDNEY P. ABRAMSON,

*Defendant.*

## ORDER

(February 3, 1968)

Reported at 278 F. Supp. 849 (1968)

The above matter came on for hearing before the undersigned, a judge of this court at St. Paul, Minnesota, on January 27, 1968, on the motion of plaintiff for a preliminary injunction. Appearances for plaintiff in support of the motion were Best, Flanagan, Lewis, Simonet & Bellows by Leonard Simonet and Harold Evarts, Esqs., 1200 First National Bank Building, Minneapolis; D'Ancona, Pflaum, Wyatt & Riskind by Edgar Bernhard, Esq., 33 North LaSalle Street, Chicago, Illinois; Raskin, Downing & Dammann by Robert J. Downing, Esq., 105 South LaSalle Street, Chicago, Illinois. O'Connor, Collins & Abramson by Theodore J. Collins, Esq., 1001 Degree of Honor Bldg., St. Paul, appeared for defendant in opposition to the motion. Briggs & Morgan by David Forsberg and Sam Hanson, Esqs. appeared for Homer A. Bonhiver, the court ap-

pointed Receiver of American Allied Insurance Company and submitted an application to intervene as a party defendant. He was permitted by the court to participate in the proceedings and subsequently on January 31, 1968, the court entered an order without objection permitting intervention by said receiver and the filing and serving of his answer and counterclaim.

The court has examined the pleadings, the motion papers and accompanying affidavits, has heard the testimony adduced at the hearing and has read and examined the excellent briefs filed by the various parties. On the basis thereof, and on the basis of all of the files, records and proceedings herein,

IT IS ORDERED That the motion of plaintiff be, and the same hereby is, in all things denied.

Dated: February 3, 1968.

PHILIP NEVILLE
United States District Judge

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MEMORANDUM

The above-entitled action has been filed with this court seeking to enjoin the defendant, now an attorney in private practice in Minnesota, from acting and serving as one of the attorneys for the court appointed Receiver of American Allied Insurance Co., now defunct. The action further seeks to restrain defendant's "agents, servants, employees and attorneys, and all persons in active concert or participation with him or who receive actual notice of the order [of this court] . . ." from instituting legal action against plaintiff and from in effect using documents or information known to or now or heretofore within the knowledge of defendant. The receiver has indicated his clear intention to sue the plaintiff, a Chicago banking institution, for some $10,500,000.00, alleging fraud

on its part. More than two months ago the receiver furnished plaintiff with a draft complaint in the proposed action.

Before being retained as an attorney for the receiver, defendant, now 31 years of age, had been retained as a special United States District Attorney, succeeding his prior full-time employment as an assistant United States Attorney, to assist and act as "second chair" for the federal prosecutor in the trial of a criminal case brought by the United States against numerous defendants, including three former officers of plaintiff. Many, if not all, of the same issues which were involved in the abortive criminal trial will be in the fore in the prospective lawsuit to be brought against plaintiff by the receiver. Defendant was intimately associated on the government's side with the trial of the criminal case and sat through some 13 weeks of trial, now recorded in a typed transcript of approximately 17,000 pages. He became aware of, or certainly had access to, various FBI and postal inspectors' written and oral reports and had knowledge of, and available to him, the grand jury minutes and all grand jury and government exhibits. He assisted extensively in the trial preparation.

Prior to the institution of the criminal action by the federal government, a number of plaintiff's records were subpoenaed and submitted to or used before the indicting grand jury. Defendant, though then employed as an assistant United States Attorney, testified that he had little or nothing to do with the case at the grand jury stage. Many of the same documents, however, and perhaps others were actually used in the criminal trial.

Some several months after completion of the criminal trial resulting in not guilty verdicts, the American Allied receiver requested defendant to associate himself as one of the counsel in the prospective suit against plaintiff above mentioned. The

receiver did this for the reason, as set out in his petition to the District Court of Ramsey County, Minnesota, that:

> "The employment of Mr. Sidney P. Abramson as special counsel in these matters should, in the opinion of the petitioner, be generally advantageous to the receivership estate and should likewise result in substantial over-all saving of legal time and expense to the estate by virtue of the extensive knowledge and background Mr. Abramson now has in respect to matters particularly relating to the Exchange National Bank of Chicago as a result of his participation as Special Assistant to the United States Attorney in the criminal trials recently concluded at Bismarck, North Dakota, involving the trial of certain former officers of American Allied Insurance Company and Allied Realty of St. Paul, Inc."

Plaintiff claims defendant is guilty of a breach of Canon 36 of the American Bar Association's Canons of Ethics (heretofore adopted by the Minnesota Supreme Court) and so should be enjoined from acting as attorney for the receiver. Canon 36 provides as follows:

> "A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.
>
> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Plaintiff asserts irreparable harm to itself if defendant be not enjoined and its other relief be denied.

On this hearing for preliminary injunction, the court need not and does not determine the merits of the case. The court

at this juncture inquires only whether immediate and irreparable harm will befall the plaintiff, Exchange National Bank, if injunctive relief against the filing of the lawsuit with defendant as counsel is not granted. Herein lies a weak link in plaintiff's present motion. In the court's view, there is no substantial evidence that, upon the filing of a lawsuit by the receiver, whether or not defendant acts as counsel, plaintiff will sustain "immediate and irreparable harm." The only harm plaintiff alleges is that which might flow from widespread publicity in Chicago and elsewhere when the suit is filed which, it states, "would undermine the confidence of plaintiff's depositors and customers."

The complaint in the case at bar asserts that the Exchange National Bank is the sixth largest National bank in the state of Illinois, that it has $245,000,000.00 in deposits, 40,000 accounts, and 230 correspondent banks, locally and internationally. That the filing of a lawsuit in the amount of $10,500,000 charging fraud might be an embarrassment to the bank no one can doubt; nor can anyone doubt that if any damage actually is sustained by the filing of the lawsuit, it would be most difficult to attempt to assess such and to make recovery in an action at law. Plaintiff's position, however, ignores the fact that:

(1) It was first furnished with a draft complaint of the proposed lawsuit more than two months ago, in November, 1967, in which defendant was designated as attorney for the receiver and in a period of two months or more it made no application for his removal to the Ramsey County District Court which approved the appointment and hiring of defendant;

(2) There are now on file at least two other lawsuits, one in Minnesota and apparently another—the subject of an offer of proof at the hearing—filed some time ago in Illinois,

in at least the former of which plaintiff to a greater or lesser extent is charged with fraud;

(3) The draft complaint is in fact now on file with this court, with all its allegation of fraud and misconduct, by virtue of plaintiff's own actions in filing it and so the same is now a public record and available to all;

(4) Even were this court to grant plaintiff the relief requested, it is a compelling inference from the evidence and the posture of matters presently that without too much delay, some other counsel would be employed by the receiver and in due course would commence an action with allegations similar to the draft complaint. The transcript of the criminal trial is available, and certainly discovery proceedings in a civil action under the Federal Rules of Civil Procedure would disclose substantially the same documentary evidence and facts as are now in the possession of defendant. Granting plaintiff's request would seem therefore not to remove the alleged injury and harm flowing from publicity, if such it be, but at best only to delay it. Any person in business, including a national bank, must bear with, and be subjected to the hazard of, adverse publicity that may arise on the filing of a lawsuit. Thousands are filed daily in the United States and "immediate and irreparable harm" does not necessarily or very often follow. This is true whether or not a particular plaintiff's attorney is extremely knowledgeable and sophisticated or completely inept. The result is the same publicity-wise and there is no, or at best a very slight, sequitur between the character or knowledge of counsel for a particular plaintiff and the amount of adverse publicity engendered. The removal or enjoining of defendant in this case does not cure or remove plaintiff's claimed cause for worry. Of course, to suppress or grant immunity to all evidence, knowledge and information which the

receiver now has or ever acquired by and through defendant Abramson might render it impossible, if literally complied with, for the receiver to institute any action at all. The court is quite unwilling to accept this basis for the granting of a preliminary injunction without further serious consideration on a trial of the merits.

Quaere whether the filing of even a wholly groundless lawsuit with its attendant adverse publicity, absent proof of deliberate intent showing malicious prosecution on a plaintiff's part, gives rise to a cause of action at all. Courts are open to all litigants, to the press and to the public. The consequences thereof which is what plaintiff here claims to cause irreparable harm, are not alleviated by removal of a particular attorney who is representing a party plaintiff, nor it would seem materially lessened merely by delay.

For all of the reasons above, plaintiff's motion for a preliminary injunction is denied.

# APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19311

SIDNEY P. ABRAMSON,

*Appellant,*

vs.

EXCHANGE NATIONAL BANK OF
CHICAGO, ET AL.,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MINNESOTA

No. 19321

EXCHANGE NATIONAL BANK OF
CHICAGO,

*Appellant,*

vs.

ALLIED REALTY OF ST. PAUL, INC.,
SIDNEY P. ABRAMSON, ET AL.,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MINNESOTA

On consideration of the motion of Sidney P. Abramson, Appellant in No. 19311, for a stay of the mandate in these causes

pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

April 10, 1969

# APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-68 Civil 24

EXCHANGE NATIONAL BANK OF CHICAGO,
a national banking association,

*Plaintiff,*

vs.

SIDNEY P. ABRAMSON,

*Defendant.*

The above entitled matter came on for hearing before the Honorable Philip Neville, a Judge of the above-entitled court, at St. Paul, Minnesota, at 9:00 o'clock A.M., January 27, 1968.

APPEARANCES

Best, Flanagan, Lewis, Simonet and Bellows by Leonard Simonet, Esq., and Harold Evarts, Esq., and Edgar Bernhard, Esq., and Merrill A. Freed, Esq., and Robert J. Downing, Esq., Attorneys for Plaintiff.

Theodore J. Collins, Esq., Attorney for Defendant.

David Forsberg, Esq., and Sam Hanson, Esq., Attorneys appearing on behalf of Homer Bonhiver.

[i] INDEX OF WITNESSES


| | Direct | Cross | Redirect | Recross |
|---|---|---|---|---|
| Sidney P. Abramson | 60 | 82 | | |
| | | 118 | | |
| | | 123 | | |
| Hyam Segell | 99 | | | |

* * * * *

[99]

Whereupon,

HYAM SEGELL,

a witness called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Collins:

Q. For the record, will you state your full name, please, and give us your address? A. Hyam Segell, 554 Glendale Street, St. Paul.

Q. And what is your profession? A. I am an attorney.

Q. And where do you practice? A. 500 Minnesota Building, St. Paul.

Q. And what law school did you graduate from? A. University of Minnesota Law School.

Q. Subsequent to your graduation, by whom were you employed? A. I was self-employed for a period of, I believe, oh, eight or nine years, at which time I became employed by the United States Government in the United States [100] Attorney's office in St. Paul.

Q. What time was that that you became employed by the United States Attorney's office? A. That was June, 1957.

Q. How long were you employed by the United States Attorney in the District of Minnesota? A. Until September, 1960.

Q. Subsequent to September, 1960, what did you do? A. For a period of about seven or eight months, I was first assistant corporation counsel in St. Paul and at the end of that time I entered private practice with Fallon Kelly and William S. Fallon.

Mr. Bernhard: Your Honor, I take it that some duties of Mr. Segell in the United States Attorney's office have to do with the matters that we are concerned with in this case; otherwise I object to further examination of this witness.

The Court: Well, I don't know as yet what he has in mind.

Mr. Collins: These matters are preliminary, Your Honor, and they have a bearing, he has testimony which is brief but has a bearing on the issues in this matter, and I would ask that [101] that we proceed.

The Court: You may proceed. I will note your objection.

Mr. Collins: Thank you, Your Honor.

By Mr. Collins:

Q. Mr. Segell, have you served on any Ethics Committee? A. Yes.

Q. At the present time, do you hold any office in the Ramsey County Bar Association? A. Yes, sir.

Q. What is that office? A. President-elect.

Q. Mr. Segell, during your tenure as United States attorney or Assistant United States Attorney, did you participate in the criminal trial of certain individuals associated with the Twin City Rapid Transit Company? A. Yes, sir.

Mr. Bernhard: Now I object, Your Honor, renew my objection, since it seems to me clear that this has no bearing on the issues before Your Honor.

Mr. Collins: Your Honor, when [102] counsel thinks that something is hurting he jumps up and says it is irrelevant. I ask to proceed without continual interruption.

The Court: Well, he has a right to make an objection.

Are you producing Mr. Segell as a character witness, is that it?

Mr. Collins: Not at all, Your Honor, I am producing Mr. Segell as a witness as to the ethical mores in this community,

which is, in the words of Judge Kauffman, the standard under which Canon 36 must be interpreted. We have a brief which we will provide to the Court at the conclusion of the hearing, written in advance of testimony.

The Court: Is that this 136—

Mr. Collins: Well, his decision is in United States versus Standard Oil. It has an article on Canon 37, Harvard Law Review, to which we will make reference. This witness is produced at this time, Your Honor, and testimony will be elicited as to the ethical mores in this community as to certain matters raised by this motion.

Mr. Bernhard: My objection certainly [103] stands, Your Honor. The decisions pay no attention to this concept of the ethical mores of the community. In fact, they are safeguarding the ethical mores of the community on a very high level. If the ethical mores don't live up to Canon 36, the courts take action.

The Court: Well, he is trying to show, I take it, that it is accepted practice in some way or another. I suppose that the particular question before the witness relative to the Twin City Rapid Transit is supposed to be an instance of something or other. I will hear the evidence. Your objection is noted. It isn't very clear to me what weight it will get, but I haven't read the decisions yet. You will have to rely on the Court to be wise enough to disregard it if it be determined to be immaterial. But I do think that if he is to testify as to an existing custom, it ought to be with reference to that and not a particular instance that he happens to know of. That bothers me a little.

Mr. Collins: We will certainly rely on the Court's ability to separate such [104] matters as should be separated. However, Your Honor, if I might be heard, we have the particular

matter that we would like to produce in evidence because we feel it uniquely bears on this situation and may be of assistance to the Court, and even though it is a particular instance, I ask leave to proceed with it.

The Court: Well, the only analogy that comes to mind is general reputation evidence. There, you don't ask a specific instance of what somebody thinks of somebody else, but you testify as to the general reputation. Here, you are trying to establish some custom, some accepted method of proceeding, and he is a member of the community and can testify to that. When you get down to pointing out a particular instance where he did, it may well be that I will disregard your evidence on that under what I consider the rules, but with that reservation, you go ahead and present it.

Mr. Bernhard: Your Honor, I have one further objection. It seems to me this goes [105] to the merits of the case. The question on this matter of the issuance of a preliminary injunction goes to the question of whether there was, in fact, a violation of Canon 36. Interpretations of the mores of the community, interpretations of someone's version of how Canon 36 ought to be read, irrespective of decisions, seems to me, at best, goes to the merits. I can imagine that this might be admissible on the final trial of this case, although it is a little difficult for me to see that, but it seems to me clearly a matter of the merits of the case which are not to be heard at this point, and therefore, I make an objection on that ground, also.

The Court: Well, all right, your objections are noted, and I don't mean to be cavalier about it, but I think under the exigencies of this circumstance, I will hear the evidence. I will overrule the objection.

Mr. Collins: Thank you, Your Honor.

[106] By Mr. Collins:

Q. Your answer to the question Mr. Segell? Do you still remember it? A. Could the reporter read it back?

Q. I will repeat it. Did you, during your tenure as assistant United States Attorney for the District of Minnesota, participate in the criminal prosecution of certain individuals employed by or connected with the Twin City Rapid Transit Company? A. Yes, sir.

Q. And subsequent to that criminal prosecution, were you asked to participate in, as a private lawyer, a civil suit involving the Twin City Rapid Transit Company? A. Yes, I was. I should preface that by saying, Mr. Collins, that I was, after being in private practice, hired by the United States Attorney General to participate firstly, in an appeal of that matter.

Q. That was the appeal of the criminal case? A. Yes. That was done as a private practitioner.

Q. And then subsequent to that, were you also contacted to appear in a civil case involving the Twin City Rapid Transit Company? A. Yes, sir, and I should say there that the [107] lawsuit had already been started when I was contacted.

Q. Mr. Segell, prior to involving yourself in such a civil case, did you contact various members of the Ethics Committee and of the Bench and Bar in this locality? A. Yes, sir.

Q. Among those contacted was Gunnar Nordbye? A. My partner indicated to me yesterday that he had a recollection of this. I don't at the present time have any specific recollection. I know I contacted at least one judge, and I don't remember whether it was Judge Nordbye or not.

Q. Subsequent to that, did you appear and participate in the civil case involving the Twin City Rapid Transit Company? A. Yes.

Q. Was there, Mr. Segell, based upon your experience as a practicing attorney, United States Attorney, private attorney, upon your membership in the Ethics Committee, was there in your judgment—don't bother answering immediately so Mr. Bernhard can get to his feet—any appearance of evil in your appearance in the civil case involving the Twin City Rapid Transit Company?

[108] Mr. Bernhard: Your Honor, I certainly object to that, but I wonder, instead of interrupting Mr. Collins, if my objection can't stand to this whole line of examination? I assume it does. I have purposely not renewed the objection, and I take it that at the close of the witness's testimony, Your Honor will rule on the objection. This is, as Mr. Collins anticipated, about triply objectionable.

Mr. Collins: Your Honor, we are satisfied to have him have a continuing objection.

The Court: Well, which side of the Twin City Rapid civil litigation did he appear on?

Mr. Collins: I will withdraw the question presently before the witness and ask.

By Mr. Collins:

Q. Which side of the civil litigation involving the Twin City Rapid Transit Company did you appear on? A. I appeared on the side of the Twin City Rapid Transit Company against the bonding company.

[109] Q. And who had the bonding company bonded? A. The bonding company had bonded the individual officers of Twin City Rapid Transit.

Q. Were these individual officers the same persons who were tried in the criminal trial? A. Basically, yes.

Q. Now, if you have in mind my prior question, I wonder if you would answer whether or not there was any appearance

of evil in your appearing in the civil case as you did? A. Not in my opinion, no.

[110] Q. Now, Mr. Segell, based upon your experience as a practicing lawyer, and all of that experience; based also upon your service upon the Ethics Committee before the Bar Association, I would like you, for the purpose of the following questions, to assume certain facts as true.

I would like you to assume that in 1962, an attorney was employed by the United States Attorney's Office of the District of Minnesota; that thereafter, he worked steadily for the United States Attorney's Office for the District of Minnesota until December of 1966.

I would like you to assume further that in August of 1965, the Ramsey County District Court declared certain insurance companies insolvent and established a court-appointed receiver for these insurance companies.

I would like you to assume further, for purposes of this question, that prior to the establishment of the receivership, a certain bank located in Illinois had, by advertisement, begun foreclosure procedure against the security interest in real estate in Ramsey County. I would like you to assume further that subsequent to the foreclosure procedure and after the establishment of the receivership, the receiver began an action in Ramsey County District Court against the bank, seeking to set aside the mortgage or security interest sought to be foreclosed by that bank on the [111] grounds of fraud.

I would like you to further assume that in October of 1965, the grand Jury of the District of Minnesota returned an indictment naming a number of individuals, among whom were three persons who were or had been employees of the same national bank involved in the foreclosure proceedings.

I would like you to further assume that up until that point,

this lawyer who had worked for the United States District Attorney had had no contact with the initiation of the investigation of the matters which eventually resulted in the indictment of October, 1965. I would like you to assume for the purposes of this question that he did not present anything to the Grand Jury which returned that indictment, nor in any way appeared before said Grand Jury of October, 1965.

I would like you to further assume that subsequent to the return of the indictment, the trial of the individuals named in the indictment was, for various reasons, deferred pending eventually a general election in Minnesota in the fall of 1965.

I would like you to assume that after the indictment and until its deferral, this attorney did appear, subject to the control of the United States Attorney or the acting United States Attorney, on behalf of the United States in connection with the indictment. I would like you to further [112] assume that during this same period, this attorney, subject, again, to the control of the United States Attorney or the acting United States Attorney, did work upon documents and evidence to be used or which was used in the eventual trial.

I would like you to further assume that in late 1966, motions for change of venue were made, considered, and a change of venue occurred whereby the trial of the criminal charge represented by the October, 1965, indictment was transferred to Bismarck, North Dakota.

I would like you to further assume that in December, 1966, the attorney of whom we have been speaking left the employ of the United States Government; that he was thereafter, in January of 1967 or at some time subsequent, employed as a special assistant United States Attorney to assist in the trial of the criminal indictment represented—excuse me—criminal

indictment which had been transferred to Bismarck, North Dakota.

I would like you to assume that at the time of his appointment as special assistant, he was in private practice; that thereafter, he did, in fact, in March, April, May and June go to Bismarck, North Dakota, and Washington, D.C., and appeared on behalf of the government as an assistant United States District Attorney in the trial of the individuals named in the indictment, or of five and eventually four of [113] the individuals named in the indictment.

I would ask you to further assume that subsequent to the criminal trial, this attorney was contacted by the court-appointed receiver and was employed by the court-appointed receiver, under an order of the District Court of Ramsey County, to assist in the prosecution of certain civil actions against a national bank located in Illinois. I would like you to assume, further, that this national bank located in Illinois had not been indicted in the criminal indictment of October, 1965, nor tried, nor had any of its employees or ex-employees been tried in Bismarck, North Dakota.

I would like you to further assume that subsequent to his employment and the order authorizing his employment by the court-appointed receiver, the attorney of whom we speak entered upon his employment as attorney for the court-appointed receiver and did assist in the preparation of a civil complaint naming this bank in Illinois for recovery of certain funds for the court-appointed receiver in Minnesota.

I would like you to assume each and all of those facts, if you can, and based upon said facts, I would like to ask you, yes or no, whether or not you have an opinion as to whether the conduct of such an attorney is a violation of Canon 6, 36 or 37 or has the appearance of evil or is in violation of legal

or ethical mores of this community, and [114] will you just answer yes or no, and then Mr. Bernhard can get to his feet to stop the answer.

Mr. Bernhard: I would like to get to my feet before the answer is given, rather than after.

I have a further objection in addition to the objections I have made, and that is that this hypothetical question is not complete and it leaves out facts that already have been testified to by Mr. Abramson, so that it is an improper question from that point of view, also.

Mr. Collins: Your Honor, at this point, I would request counsel to indicate what points in the testimony of Mr. Abramson or otherwise, what facts are left out, and, in fact, I request counsel to submit such facts to the witness.

Mr. Bernhard: I will submit them to counsel, not to the witness.

The hypothetical question leaves out any reference to the Grand Jury proceedings, the testimony given to the Grand Jury, and the transcript thereof; the reports of F.B.I. agents; the conversations with post office inspectors, among other things.

[115] By Mr. Collins:

Q. Mr. Segell, I would ask you to assume that notwithstanding the fact that this attorney had not participated in, presented or appeared before the Grand Jury, that he may have seen the testimony of some witnesses before the Grand Jury. I ask you to assume that; and assume that he saw F.B.I. reports, had conversations with postal inspectors, saw postal inspectors' reports.

If that cures Mr. Bernhard's objection, I will ask you to assume all those things. Do you have an opinion, Mr. Segell, yes or no?

Mr. Bernhard: My objection stands, if the Court please.

The Court: Well—

Mr. Bernhard: It's also a triple question, and therefore is objectionable on that ground. He asks for conclusions.

The Court: Well, I am not sure how much help it is going to be to the Court one way or the other for a lawyer to express an opinion. I happen to know the witness because I am from the Bar of Minnesota myself, and I know he is a man of good experience and reputation. I am going to let him answer and overrule the objection.

[116] The question now is, do you have an opinion, either yes or no?

The Witness: I can't even answer that yes or no, Your Honor. I firstly have to try to refresh my recollection as to Canons 36 and 37. I believe Canon 36 is the conflict of interest Canon. I don't recall 37, unless I have those reversed.

By Mr. Collins:

Q. I will place before you Canon 36. I will eliminate Canons 37 and 6 from the question and ask you—excuse me—Canons 6 and 37, and ask you to answer as to Canon 36. A. This is 36 that you have pointed out to me?

Q. Yes. A. And 37 is what, is that the conflict?

Q. The confidential information Canon. I will lay before you the Canons of Professional Ethics and you can see Canon 37 and Canon 6. A. The answer is yes, I have an opinion.

Q. What is that opinion? A. My opinion is that it is not a violation of the two Canons when read in combination.

Q. Thank you, Mr. Segell. I have no further questions.

Mr. Bernhard: Your Honor, I have no cross-examination. I am renewing my objections, and [117] I ask that the testimony of this witness be stricken.

The Court: Well, I will note that motion. I take it that this

matter is going to end up by my taking it under advisement, because I see that counsel has a brief, and you have cited some authorities that I haven't had the opportunity to study. So I will also consider the motion to strike and take it under advisement. But I do, offhand, feel that because this particular member of the Bar had experience with a particular case in which he inquired of some people whether under those circumstances he was authorized to proceed, that that doesn't carry much weight under these different circumstances. I don't mean to deprecate your testimony, Mr. Segell.

The Witness: It doesn't bother me a bit, Your Honor.

The Court: That is just a general expression of my thought about it. All right.

Mr. Collins: Thank you, Your Honor. Thank you, Mr. Segell.

(Witness excused.)

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In The

# Supreme Court of the United States

October Term, 1969

No. 208

EXCHANGE NATIONAL BANK OF CHICAGO,
*Cross-Petitioner,*

vs.

SIDNEY P. ABRAMSON, ALLIED REALTY OF ST. PAUL, INC., GERTRUDE BROWN, PHILLIP KITZER, SR. and HELEN KITZER, his wife, PHILLIP C. KITZER and HELEN KITZER, his wife,

*Respondents.*

## CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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*Respondents.*

---

## CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

Cross-petitioner, EXCHANGE NATIONAL BANK OF CHICAGO, prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on March 26, 1969, as affirmed that portion of the order of the United States District Court for the District of Minnesota, dated April 11, 1968, which denied cross-petitioner's motion for relief—by reason of the violation by Sidney P. Abramson (respondent) of Canon 36 of the American Bar Association's Canons of Professional Ethics—against others who may have acted in concert with respondent, and for corresponding relief beyond the mere disqualification of respondent.

## CITATIONS TO OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, entered March 26, 1969, has not yet appeared in the printed reports and is set forth in Appendix B hereto, *infra*. The opinion of the United States District Court for the District of Minnesota is reported in 283 F. Supp. 464 (1968) and is printed in Appendix C hereto, *infra*. The separate order of the District Court, dated April 11, 1968, is unreported and is printed in Appendix D hereto, *infra*.

## JURISDICTION

The judgment of the Court of Appeals affirming that portion of the District Court's order from which cross-petitioner had appealed was dated and entered on March 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED

Whether, in a case involving violation of the Canons of Ethics by an attorney, the relief granted was not so narrow and limited as to undermine the Canons of Ethics.

## CANON OF ETHICS INVOLVED

The Canon of Ethics which the courts below have held violated by respondent is Canon 36, which provides:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

## STATEMENT OF THE CASE

This case was commenced in the District Court for Ramsey County, Minnesota, Second Judicial District, on or about September 17, 1965, and a petition for removal joined in by all defendants, together with a removal bond, was filed on October 7, 1965, the case thereupon being removed to the United States District Court for the District of Minnesota, Third Division. The requisite grounds for removal existed in that the amount in controversy, exclusive of interest and costs, exceeded $10,000, and there was complete diversity of citizenship.

The relief prayed for in the suit was to void a $250,000 mortgage held by cross-petitioner and the subsequent foreclosure thereof. The plaintiff, Allied Realty of St. Paul, Inc. ("Allied Realty"), was initially represented by counsel other than respondent.

The mortgage transaction subsequently became involved in a lengthy federal criminal case against two of the defendants herein (Phillip Kitzer, Sr., and Phillip C. Kitzer), as well as three former employees of cross-petitioner.

Respondent, as Assistant United States Attorney and Special Assistant United States Attorney, aided in the preparation and prosecution of the criminal case. After he retired from public employ, respondent was retained as Special Counsel (to act with previously retained counsel) by Allied Realty on the basis of respondent's knowledge and background gained in the criminal case.

Respondent's first appearance on behalf of Allied Realty was to file, on November 24, 1967, an amended complaint, prepared and signed by him, based on the information developed during the criminal trial.

On January 25, 1968, cross-petitioner filed a separate action against respondent in the United States District Court for the District of Minnesota, seeking an injunction to re-

strain further violation of Canon 36 of the American Bar Association's Canons of Professional Ethics. The separate action was subsequently dismissed by the Court of Appeals for the Eighth Circuit, *sua sponte,* on the stated ground of absence of jurisdictional amount.

On February 29, 1968, Allied Realty moved in the case at bar for an order declaring (1) that respondent was guilty of no unprofessional or unethical conduct, (2) that respondent might continue to act as counsel for Allied Realty, and (3) that Allied Realty could use any and all documents, information and knowledge learned about, examined or obtained by respondent in the course of his employment as government attorney.

On March 11, 1968, cross-petitioner filed its motion (1) to declare respondent's conduct to be in violation of Canon 36; (2) to enjoin respondent, his agents, servants, employees and attorneys, and all persons in active concert or participation with respondent, from (a) acting as counsel in any action against cross-petitioner involving claims investigated by respondent during his prior employment as government attorney; (b) using information, documents or knowledge learned, examined or obtained by respondent in the course of his prior government employment; and (c) filing a lawsuit against cross-petitioner involving allegations prepared by or with the assistance of respondent; and (3) to expunge from the files the amended complaint prepared and filed by respondent on November 24, 1967.

On April 11, 1968, the District Court entered an order (App. D) denying the motion of Allied Realty as to parts (1) and (2) thereof, and granting the motion as to part (3) thereof. The order granted cross-petitioner's motion as to part (1) thereof, denied the motion as to part (2) thereof, except that the same was granted as to respondent individually, and denied the motion as to part (3) thereof.

Allied Realty took no appeal from the April 11 order. Respondent was granted leave to intervene and appealed to the Court of Appeals for the Eighth Circuit. Cross-petitioner filed a cross-appeal from the denial by the District Court of a portion of the relief prayed by cross-petitioner. On March 26, 1969, the Court of Appeals entered judgment affirming the April 11 order.

Respondent has filed a separate petition for certiorari seeking reversal of the Canon 36 issue which has now twice been decided adversely to respondent. Cross-petitioner seeks certiorari to obtain the full scope of relief needed to redress the clear violation of legal ethics which occurred in this case and to make the Canons of Professional Ethics meaningful and effective.

## REASONS FOR ALLOWANCE OF THE WRIT

The order of April 11, 1968, was limited to respondent, individually, despite the fact that Rule 65(d) of the Federal Rules of Civil Procedure expressly provides that every order granting an injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

It seems clear that the April 11 order, limited as it is to a single named person, could easily be circumvented unless it is broadened at least to the extent required by Rule 65(d). If respondent is enjoined from the use against cross-petitioners of the information and knowledge which he has gained from matters investigated or passed upon by him in public employ, and that same information and knowledge is nevertheless usable when delivered by him into the hands of agents or attorneys or associates of his, it would seem that Canon 36 is rendered nugatory.

If everything he has discovered in the course of his public employment which he is enjoined from putting to use in another action may properly be handed over by him to others for the same uses to which he was going to put the same material, Canon 36 would by indirection become a nullity. The Canons are surely not intended to be interpreted in such a way as to permit anyone to do indirectly what he is forbidden to do directly.

Courts have not hesitated, in cases involving violations of legal ethics, to extend the scope of relief beyond mere disqualification of the attorney. Thus, in *United States v. Mahaney,* 27 F. Supp 463 (N.D. Cal. 1939), the court held not only that a former attorney for the Securities and Exchange Commission, who was thereafter retained by a defendant who had previously been investigated by the Commission during the attorney's employment, was to be enjoined from such representation, but the use of confidential information obtained by him while employed by the Commission was to be enjoined. The court invoked not only Canon 6 (because the attorney represented an adverse interest) but also Canon 36 (pages 467-8), Canon 37, and the California Code of Civil Procedure. The court held that the Government was entitled to enjoin the use *by defendants* in the pending litigation of confidential information obtained by the attorney while in the employ of the Commission.

It should be understood that cross-petitioner is not contending that if document X, or knowledge of it or information about it, is obtained through some proper source, it is nevertheless rendered unusable because it was also discovered by respondent in the course of his investigations while in public employ.

Material is usable—or not—depending upon the source from which it was obtained. Thus Canon 36 is given the effect intended: It disqualifies material which has been in-

vestigated or passed upon by a person in public office and prevents its use by that person or anyone gaining his knowledge of it through that person; but at the same time, it permits the use of the same material if gained from an unprohibited source.

Courts show no reluctance in ruling documents inadmissible which come from an improper source. A recent case emphasizing the rule (though one not growing out of the violation of canons of ethics) is *Knoll Associates, Inc. v. Federal Trade Commission,* 397 F.2d 530 (7th Cir. 1968). An order of the Federal Trade Commission was set aside by the Court of Appeals because documents used by the Federal Trade Commission to prove violation of the Clayton Act were found to have been put in the hands of the Commission by one who had taken them improperly. The Commission itself had no part in any improper conduct. Nevertheless the court found that the documents had come to the Commission through one who had obtained them unlawfully and accordingly concluded "that the Commission by its use of the documents knowingly gave its approval to Prosser's unlawful act." The court therefore held "that the use of the stolen documents renders the Commission's order unenforceable." (397 F.2d at 533-34)

In the same way, if respondent's colleagues or co-counsel are now to be permitted to use material received from respondent which he obtained in the course of his public employment, they will be using the fruits of his violation of Canon 36.

The whole question of ethical standards is currently being given specific and organized attention by the legal profession. The Special Committee on Evaluation of Ethical Standards of the American Bar Association has recently issued a Preliminary Draft of Proposed Code of Professional

Responsibility. The principle behind Canon 36 would be set forth even more broadly by proposed Canon 9:

> "A lawyer should avoid even the appearance of professional impropriety."

Proposed Disciplinary Rule 9-101 (B) would expressly cover the Canon 36 situation:

> "A lawyer shall not accept private employment in a matter in which he acted as investigator or exercised more than perfunctory responsibility while he was a public employee."

We submit that, at a time when the organized bar is moving in the direction of expanding and raising the level of the code of ethics of the legal profession, Federal Courts should surely not be moving in the opposite direction by granting unduly limited and ineffective relief in cases where the violation of ethical standards has been clearly established.

If Canon 36 is to be meaningful, its restriction must reach beyond the single person directly involved. And the responsibility for rendering the Canons of Ethics fully and broadly effective rests upon the courts. We believe that the instant case offers this Court an appropriate vehicle to establish the proper guidelines for relief in this area of the law.

As has been well said in the case of *Empire Linotype School v. United States*, 143 F. Supp. 627, 633 (S.D.N.Y. 1956):

> "Without firm judicial support, the Canons of Ethics would be only reverberating generalities."

## CONCLUSION

For all the foregoing reasons, we ask that this cross-petition for a writ of certiorari be granted.

Respectfully submitted,

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## APPENDIX A

### Rule 65(d)

### Federal Rules of Civil Procedure

* * *

Rule 65(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

## APPENDIX B

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

No. 19,311

Allied Realty of St. Paul, Inc.,
Plaintiff,

vs.

Exchange National Bank of Chicago, et al.,
Defendants-Appellees,

Sidney P. Abramson,
Intervenor-Appellant.

---

No. 19,321

Exchange National Bank of Chicago,
Defendant-Appellant,

vs.

Allied Realty of St. Paul, Inc.,
Plaintiff,

Sidney P. Abramson,
Intervenor-Appellee.

---

Appeal and Cross-Appeal from the United States District Court for the District of Minnesota.

[March 20, 1969.]

---

Before VAN OOSTERHOUT, Chief Judge; MATTHES and BRIGHT, Circuit Judges.

---

VAN OOSTERHOUT, Chief Judge.

This is an appeal by intervenor Sidney P. Abramson from final order determining that Mr. Abramson is disqualified by reason of Canon 36 of the American Bar Association Canons of Professional Ethics from serving as an attorney for the plaintiff in *Allied Realty of St. Paul v. The Exchange National Bank of Chicago, et al.*, pending in the trial court. Plaintiff has not appealed from the disqualification order. Defendants have cross-appealed from the refusal of the trial court to extend the disqualification order to enjoin the use by the plaintiff of information obtained and services performed by Mr. Abramson and the refusal to extend the disqualification to other attorneys representing the plaintiff.

The trial court in a memorandum opinion supporting its order, reported at 283 F.Supp. 464, fully and fairly states the issues, the pertinent facts and the basis of its decision. We affirm the trial court's decision both upon the appeal and the cross-appeal for the reasons hereinafter stated.

A brief summary of the extensive background facts appears to be necessary to put the issues before us in proper focus. Plaintiff Allied Realty brought this action to set aside as fraudulent a mortgage it had given to the defendant bank. Such action has been pending since 1965 and was commenced prior to Mr. Abramson's appointment as attorney for the plaintiff. Plaintiff is a wholly owned subsidiary of American Allied Insurance Company. In 1965 the Minnesota federal grand jury returned an indictment against numerous individuals including three former employees of defendant bank for alleged criminal activity which brought about the failure and insolvency of Allied Insurance Company. Upon change of venue, the indictment was prosecuted in North Dakota. After a trial of thirteen weeks, all defendants were acquitted.

Abramson, who had previously served as Assistant United States Attorney, accepted employment as a Special Assistant United States Attorney to assist in the preparation and trial of the criminal case and actively participated in the investigation and the trial. The trial court upon the basis of a transcript of a portion of the record of the criminal trial, which was introduced in evidence, found:

> "These pages indicate that the government in the criminal trial attempted to show, through a series of exhibits, the mortgage transaction involving the Minnesota real estate, the subject of the present case. Neither the Receiver nor Abramson argue that this mortgage is not the same mortgage as the one involved in this case nor that such evidence was not adduced in the criminal trial. Abramson in fact reviewed many documents with officers of defendant Bank in preparation for trial, including the aforesaid mortgage documents.
>
> "Abramson does not contend that he did not marshal the documents relevant to the Minnesota mortgage transaction. Indeed, his statement which is very frank that he saw every Bank document put in evidence, coupled with the transcript showing Bank records being introduced, compels the conclusion that Abramson passed upon them with more than a mere summary perusal. Additionally, Abramson questioned Bank employees and participated in numerous pre-trial procedures." 283 F.Supp. 464, 467.

As the trial court's opinion shows, Mr. Abramson was appointed as an additional attorney for the plaintiff with the approval of the state court administering the receivership largely on the basis of relevant knowledge he had acquired in the criminal case. He subsequently caused an amendment to the complaint to be filed which was stated to be based on information available from the criminal case previously unknown to the plaintiff.

The American Bar Association Code of Ethics has been adopted by the Supreme Court of Minnesota as a standard of

professional conduct. Mr. Abramson spends considerable space in his brief to establish that he did not violate Canon 6 (conflicting interests) and Canon 37 (confidential information). There is no claim made in the present litigation that either of such canons was violated. Canon 36, the canon upon which the court based Mr. Abramson's disqualification, reads:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

The trial court in its opinion has clearly and convincingly demonstrated that Mr. Abramson's representation of the plaintiff in the present case is proscribed by Canon 36. Although Mr. Abramson's services as a government attorney had been completed and terminated prior to his employment as an additional attorney by plaintiff, he clearly falls in the category of having been in government employ and it is established as determined by the trial court that while so employed he investigated and passed upon matters involved in the present litigation.

Upon the facts before us, *Hilo Metals Co. v. Learner Co.*, D.C. Hawaii, 258 F.Supp. 23, and opinions 135, 49, 37 and 26 of the American Bar Association Committee on Professional Ethics, all of which are quoted or referred to in the trial court's opinion, support the conclusion reached by the trial court that Canon 36 requires the disqualification of Mr. Abramson as an attorney for the plaintiff.

We agree with the statement of defendants' counsel, endorsed by the trial court, that the breach of Canon 36 was inadvertent. Such determination has no bearing upon the result. The trial court held:

> "[T]he court believes that on a policy basis, it cannot make a subjective determination each time a similar

situation arises and that in general a prohibition should visit ex-government attorneys who have been involved with particular matters and later contemplate private civil employment in the same matters." 238 F.Supp. 464, 469.

In *United States v. Trafficante*, 5 Cir., 328 F.2d 117, 120, the court, in upholding a disqualification of an attorney who had been previously employed by the government, states:

"It is not necessary, in order that disqualification result from a prior employment, that it be shown that the attorney acquired knowledge while representing the prior client which could operate to his disadvantage in the subsequent adverse representation. 5 Am. Jur. 297-298, Attorneys at Law, §66.

"The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' I Thessalonians 5:22."

The court upon the record properly determined that Canon 36 disqualifies Mr. Abramson from representing the plaintiff in this case.

Upon cross-appeal, defendants urge the court erred in refusing their request to extend the order entered in the following respects: (1) To Abramson's agents, servants, employees and attorneys, and all persons in active concert or participating with him; (2) to the use, by others than Abramson, of evidence, knowledge or information examined or obtained by Abramson; (3) to the commencement of any action (except by Abramson) against the Bank based upon pleadings prepared by Abramson or based upon information and knowledge gained by Abramson in the course of his public employment; and (4) to the amended Complaint in this proceeding prepared and filed by Abramson, which the Bank asked to be expunged from the files.

With respect to item (1), there is no evidence that any person acting for plaintiff is an agent, servant or employee of Mr. Abramson. Likewise, there is no proof that any other attorney representing the plaintiff in the case is a partner of Mr. Abramson's or that Mr. Abramson will directly or indirectly derive any financial benefit out of the fees paid by the plaintiff to any other person. As previously pointed out, this action was commenced prior to Mr. Abramson's appointment by other attorneys representing the plaintiff. We find nothing in the plain language of Canon 36 which would indicate that it is designed under ordinary circumstances such as here to reach beyond the attorney who previously held public office. The purpose of the Code of Ethics is to prescribe standards of conduct for attorneys. Such purpose with respect to Canon 36 is served by the disqualification of Mr. Abramson. The canon makes no provision either directly or by fair implication for abridging any right of the plaintiff or any other attorney who does not share fees with the disqualified attorney. The Code of Ethics applies generally to attorneys, not to litigants. Absent a fee sharing arrangement with the former public official, neither the plain words nor the policy underlying the canon requires that unrelated attorneys be barred from their right to represent the plaintiff.

With respect to item (2), the use of knowledge or information obtained by Mr. Abramson in his public official capacity, Canon 36 unlike Canons 6 and 37 contains no prohibition against disclosure of information obtained while a public servant. The canon on its face would not prohibit a former official from gratuitously passing on nonconfidential information which he obtained as a public official to an interested party. The purpose of the canon appears to be to prohibit an attorney from gaining financial advantage through the use of information which he obtained as a public official.

The record in the case before us shows that the information in controversy appears in the record of the criminal trial and that the information is not confidential. The United States Attorney filed an affidavit stating that he perceived no conflict of interest in the present situation and that the evidence used would be contained in the exhibits and the transcript of the criminal trial and in other public documents.

Defendants in their brief expressly disclaim any violation of Canons 6 and 37, which deal respectively with conflict of interest and disclosure of confidential information.

*United States v. Mahaney,* N.D. Cal., 28 F.Supp. 463, principally relied upon by the defendants in support of their cross-appeal, affords no support for defendants' position. That case involved an admitted violation of Canon 6 and the court found that confidential information obtained while in public employment was wrongfully disclosed.

Our discussion of item (2) fully applies to items (3) and (4). No sound basis exists for denying plaintiff the right to commence any appropriate action against the defendants which it chooses to bring and no reasonable basis exists for depriving the plaintiff of the benefit of any pleadings which Mr. Abramson may have prepared. The issue of Mr. Abramson's right to compensation for services performed before the disqualification order is not before us.

Defendants have wholly failed to establish that the trial court abused its discretion in refusing defendants the additional relief sought beyond the disqualification of Mr. Abramson as an attorney in the case.

The judgment is affirmed both on Mr. Abramson's appeal and defendants' cross-appeal.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

## APPENDIX C

[Reported at 283 F.Supp. 464.]

---

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

---

No. 3-65 Civ. 309

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Allied Realty of St. Paul, Inc.,

Plaintiff,

vs.

Exchange National Bank of Chicago, Gertrude Brown, Phillip Kitzer, Sr. and Helen Kitzer, his wife, and Phillip C. Kitzer and Helen Kitzer, his wife,

Defendants.

---

NEVILLE, District Judge.

Involved here is the applicability of Canon 36 of the American Bar Association Canons of Professional Ethics, which Canons were adopted by the Minnesota Supreme Court May 2, 1965 as standards of professional conduct. The canon provides in relevant part:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Plaintiff by motion seeks declaratory relief that a lawyer, Sidney P. Abramson, whom it has engaged as one of its counsel in this case, by so acting neither has nor is engaged in

unprofessional or unethical conduct. Defendant seeks an order to the contrary, barring Abramson's serving in such capacity and requesting other relief.

A related matter has been before this court before. *Exchange Nat'l Bank v. Abramson,* 278 F.Supp. 849 (D. Minn. 1968). The question herein was not squarely met in that case, though on review the Court of Appeals rendered the matter moot by holding this court to be without jurisdiction. *Exchange Nat'l Bank v. Abramson,* No. 19,188, 8th Cir., February 15, 1968.

A brief history is necessary. In 1965 the Federal grand jury sitting in Minnesota returned indictments against some 14 or more individuals for alleged criminal activity growing out of the failure and ultimate insolvency of American Allied Insurance Company. Three of the former employees of defendant Bank were among those so indicted. The plaintiff in this case, Allied Realty of St. Paul, Inc., is a wholly owned subsidiary of said Allied Insurance Company. At the time of the indictments, Abramson was employed full-time as an Assistant United States Attorney for the District of Minnesota, though he had little or nothing to do at that time with the handling of the indictments. He resigned as an Assistant United States Attorney in late 1966 to enter the private practice of law. A month or so later he was requested to return to government employ solely to become a Special Assistant United States Attorney to aid and assist in the preparation and act as "second chair" in prosecuting the criminal trials. The actual trial being removed to Bismarck, North Dakota on defendants' motion for change of venue lasted 13 weeks and is now embodied in some 17,000 pages of transcript. The trial proceeded only against those who were regarded by the government as the principal defendants, including Phillip Kitzer, Sr. and Phillip C. Kitzer, who are also defendants in this action and alleged to have been at

all times here relevant the principal owners and officers of American Allied Insurance Company and the principal officers of plaintiff herein, Allied Realty. The trial resulted in jury verdicts of not guilty as to each of the defendants then on trial, including the Kitzers. The indictments as to the other defendants, including the three former employees of defendant Bank, were thereupon dismissed. Abramson's service with the government ceased shortly thereafter pursuant to his own wish.

In 1965, prior to the federal indictments, a Receiver for the affairs of American Allied Insurance Company had been duly appointed by the Minnesota State District Court in Ramsey County. The present action above-entitled in fact was commenced prior to the return of the federal indictments, and is an action seeking to set aside a claimed fraudulent mortgage on Minnesota real estate issued by plaintiff Allied Realty Company and running in favor of the defendant Bank. It appears that this claim of a fraudulent mortgage as to this transaction was involved and asserted at some stage in the 13 week criminal trial at Bismarck, North Dakota. It is asserted in the complaint in this case that the Kitzers, as principal officers and directors of plaintiff, engineered the claimed fraudulent mortgage or mortgages and certain other transactions.

In connection with his activities at the criminal trial, Abramson is very frank to admit that he was intimately associated on the government's side with the trial of the criminal case and sat through the entire trial. He became aware of, or certainly had access to, various FBI and postal inspectors' written and oral reports and had knowledge of, and available to him, the grand jury minutes and all grand jury and government exhibits. He assisted extensively in the trial preparation. Prior to the institution of the criminal action by the federal government, a number of plaintiff's records

were subpoenaed and submitted to or used before the indicting grand jury. Many of the same documents, however, and perhaps others were actually used in the criminal trial. It was some several months after completion of the criminal trial that the Receiver for American Allied Insurance Company requested Abramson to associate himself as one of the counsel in this case. The Receiver did this for the reason, as set out in his petition to the District Court of Ramsey County, Minnesota, that:

> "The employment of Mr. Sidney P. Abramson as special counsel in these matters should, in the opinion of the petitioner, be generally advantageous to the receivership estate and should likewise result in substantial over-all saving of legal time and expense to the estate by virtue of the extensive knowledge and background Mr. Abramson now has in respect to matters particularly relating to the Exchange National Bank of Chicago as a result of his participation as Special Assistant to the United States Attorney in the criminal trials recently concluded at Bismarck, North Dakota, involving the trial of certain former officers of American Allied Insurance Company and Allied Realty of St. Paul, Inc."

The Receiver employed Abramson, pursuant to the order of the Ramsey County court, as special counsel (1) to associate himself as attorney in this case and (2) to institute a new action to recover funds from this defendant for other matters and various transactions. The latter case, while still in the threatened stage and before actual service of any complaint was challenged by a separate suit brought by the defendant Bank in this court. It was in this separate suit, the object of which was to enjoin the Allied Receiver from the bringing of a threatened suit so long as Abramson represented him, that the Court of Appeals held the jurisdictional amount of $10,000 was lacking. Such a jurisdictional lack cannot, it seems to this court, be asserted or claimed in the

present proceeding which is not a separate suit solely to challenge Abramson, but is a motion in a presently pending suit (which itself clearly involves more than the jurisdictional minimum) to bar Abramson's association as counsel for plaintiff.

It should be clearly noted that this is not a case wherein an attorney leaves the government employ and becomes retained by the person or company against whom the government has been proceeding. Such would be "switching the sides" in direct contravention of Canon 6 of the aforesaid Canons. No such charge is here made. The position Abramson now takes is consistent with and not adverse to the one he took while with the government.

Nor does the situation at hand involve Canon 37 which prohibits the disclosure of the client's private and confidential information, for there has been filed with this court a full consent to Abramson's proceeding in this matter, signed by the United States District Attorney for the District of Minnesota.

In its brief, counsel for defendant says of Abramson:

> ". . . both informally in Your Honor's Chambers, and on the record at the hearing on our motion for preliminary injunction, we made clear that we are not only *not* attacking the Defendant's character or integrity but we are saying affirmatively that we are satisfied — as no doubt the Court is satisfied — that Mr. Abramson's breach of Canon 36 was inadvertent." (Emphasis added.)

The court quite agrees with and endorses this statement.

The question then comes down to whether an attorney who has "investigated" or "passed upon" a particular matter while in the government employ may avail himself, after his government service, of a private legal retainer which involves not just his experience, knowledge and expertise acquired while in the government employ, but involves the use of his

knowledge of a particular case or proceeding. It is this latter which makes Abramson's employment particularly valuable to the Receiver in this case, and which this court feels it necessary to condemn. Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter—for which the government paid him while he was learning it and for which now the client who employs him theoretically will not have to pay. This, it seems, is the situation in the present case and exactly the type of involvement which Canon 36 was designed to prevent.

The distinction attempted to be made that Abramson technically did not "investigate" or "pass upon" within the meaning of Canon 36 is tenuous, when it is considered that he devoted many hours to preparation for trial and spent the 13 weeks in the court room substantially every day if not every day assisting at trial. Such activity certainly is within the pale of Canon 36.

Five pages from the lengthy criminal trial transcript were introduced and received at the hearing before this court. These pages indicate that the government in the criminal trial attempted to show, through a series of exhibits, the mortgage transaction involving the Minnesota real estate, the subject of the present case. Neither the Receiver nor Abramson argue that this mortgage is not the same mortgage as the

one involved in this case nor that such evidence was not adduced in the criminal trial. Abramson in fact reviewed many documents with officers of defendant Bank in preparation for trial, including the aforesaid mortgage documents.

Abramson does not contend that he did not marshal the documents relevant to the Minnesota mortgage transaction. Indeed, his statement which is very frank that he saw every Bank document put in evidence, coupled with the transcript showing Bank records being introduced, compels the conclusion that Abramson passed upon them with more than a mere summary perusal. Additionally, Abramson questioned Bank employees and participated in numerous pretrial procedures.

In November, 1967, after his appointment, Abramson moved the court to amend the civil complaint on the ground "that information available to plaintiff as the result of a proceeding entitled *United States vs. Phillip Kitzer, Sr., et al.*, concluded in June of 1967, produced information thereto unknown to the plaintiff bearing upon the facts of the above-entitled matter." While it is true that the realty transaction was not one of these transactions set out in the criminal indictment, nevertheless, evidence thereof was adduced at that trial. In sum, the court holds that the mortgage transaction constituted at least a part of the subject matter of the criminal trial and that Abramson, as Special Assistant United States Attorney, "investigated" and "passed upon" such matters within the meaning of Canon 36.

Defendant Bank submits that *Hilo Metals Co. v. Learner Co.*, 258 F.Supp. 23 (D. Ha. 1966) dealt with an identical factual situation and should be followed here. Abramson, on the other hand, suggests that *Hilo* is distinguishable on several grounds, and in any event argues that it reaches an unwarranted result. In *Hilo*, an attorney had been employed by the Justice Department, Antitrust Division, and had actively engaged in the investigation and prosecution of crim-

inal antitrust actions against the Learner Company. After retiring from the Justice Department, he accepted employment with Hilo Metals Co., Ltd., for the purpose of prosecuting on its behalf a private treble damage antitrust suit against the same defendant, the Learner Company. Defendant contended that the attorney had violated Canon 36 and should be disqualified. The court so held.

Since the court has found that Abramson investigated and passed upon the subject matter of the realty transaction involved in this case, the *Hilo* decision is highly persuasive authority. Abramson attempts to distinguish the instant circumstances on several grounds. First, it is argued that defendant Bank was not a defendant in the criminal action, but simply occupied the status of a witness; Second, the Bank is quasi-public, and therefore it should not be permitted to argue that it would not have turned its records over to Abramson but for the official position he then held; Third, the Receiver now employing Abramson is also quasi-public and should not be penalized against the public interest; Fourth, Abramson was in only an insignificant role as Special Assistant and therefore could not use his authority to prepare the case to benefit a subsequent private client; and Fifth, the action herein is not a continuation of the criminal matter in any respect whatsoever, unlike the *Hilo* case. The court acknowledges that the above contentions are for the most part true, but does not believe that such constitute legally significant distinctions from *Hilo*. This view is taken because the policy behind Canon 36 and the *Hilo* case is not altered in any respect by the distinctions asserted by Abramson. That policy is best articulated in conjunction with a discussion of Canon 36 set out by Judge Kaufman in *The Former Government Attorney and the Canons of Professional Ethics*, 70 *Harv. L. Rev.* 657 (1957), which is perhaps the

only comprehensive discussion of Canon 36 available in the literature.

Judge Kaufman observes that Canon 36, in conjunction with Canons 6 and 37, have two broad and basic purposes. First, they seek to protect a client's confidential communications. Second, they attempt to avoid an "appearance of evil." It is true that neither confidentiality nor conflicting interests are here involved. Canon 36 does not speak in terms of either. Both Canon 36 and the *Hilo* decision applying it are justified on the "appearance of evil" rationale if for no other reason.

When a government attorney resigns and enters private law practice if he is permitted to seek employment in a matter which he has previously handled for the government, he is in a position either to charge a client a fee because of his knowledge acquired through his former office, in which event he is then being remunerated twice in essence, or if he does not charge a fee therefor, the private litigant fortunate enough to obtain his services places the adverse party at a disadvantage both economically and strategically. Even when neither of these results transpire, there is certainly "an appearance of evil" which this court finds justifies the disqualification of such attorneys.

*United States v. Standard Oil Co.*, 136 F.Supp. 345 (S.D. N.Y. 1955) is the decision which apparently precipitated Judge Kaufman's article in the Harvard Law Review. Judge Kaufman wrote the opinion in that case, holding that the government must prove that an ex-government attorney investigated or passed upon the subject matter involved to justify disqualifying him in a subsequent civil suit. Although the case is inapposite to the instant facts, because it involved representation without the approval of the United States government, Judge Kaufman noted another possible "appearance of evil" prevalent in these circumstances. He referred to H. S. Drinker, *Legal Ethics* p. 130, where the problem is

discussed of preventing "even the appearance that the government servant may take a certain stand in the hope of later being privately employed to uphold or upset what he had done." 136 F.Supp. at 359. A rule of law permitting government attorneys to seek employment after retirement dealing with identical subject matter would permit the argument that while in the public employ they investigated and prosecuted only those matters conducive to successful civil employment later. There is absolutely no evidence that Abramson in the instant matter intended to so aid his practice in working as Special Assistant, but the "appearance of evil" so detrimental to the profession appears to be present. Again the wisdom of Canon 36 and the *Hilo* decision is shown.

As *United States v. Standard Oil Co., supra,* was inapplicable to the instant case, so is *United States v. Mahaney,* 27 F.Supp. 463 (N.D. Cal. 1939), which is another decision dealing with advocacy of conflicting interests without permission of the former government client. Only the *Hilo* decision bears directly on the facts at bar. Because of the policies behind that decision as pointed out above, the court follows that case.

The defendant Bank also points to Opinion 135 of the American Bar Association Committee on Professional Ethics and Grievances as authority for its position. In that opinion the Committee condemns a practice whereby a public prosecutor accepts employment from one of the parties to an automobile accident case after investigating the case from a criminal standpoint for the State and declining to prosecute. The rationale used by the Committee noted the coercive effect that a prosecutor may have on private individuals he interviews and may lead them to divulge information that could be used in a civil action. The opinion reads in part as follows:

> "If the lawyer making the approach does so under sanction or color of official power, he thereby more cer-

tainly disqualifies himself from later participation as counsel in any civil litigation having its basis in or connected with the occurrence previously investigated as to its potential criminal aspects.

A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Public policy forbids. Aldridge vs. Capps, 56 Okla. 678, 156 P. 624."

The Bank contends that the same rationale is available in this case, though Abramson argues in effect that here the Bank is such a sophisticated witness that it was in no fashion coerced by the government. While Abramson may in fact be correct in his analysis, the court believes that on a policy basis, it cannot make a subjective determination each time a similar situation arises and that in general a prohibition should visit ex-government attorneys who have been involved with particular matters and later contemplate private civil employment in the same matters. The same finding is true with regard to numerous other minute distinctions counsel attempts to show to distinguish the instant case from *Hilo* and the policy of Canon 36. A quote from *Hilo* is appropriate:

"The philosophy of Canon 36 was well stated by the Committee in its opinion #49. With particular reference to that portion of the canon here involved, the opinion reads:

. . .

'In *Opinion 26*, we stated that the second paragraph of the canon:

> was intended to forbid a lawyer accepting private legal employment in any matter involving the same facts as were involved in any specific question which he had previously investigated while in public office or public employ.

and, in *Opinion 37*, when referring to *Opinion 26*, we stated:

> The basis of this decision was that as a public legal official he was acting for the state, and he

> should not later accept any private employment in the same matter *(whether for or against his former opinion or position)*, on account of the manifest possibility that his action as a public legal official might be influenced (or be open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or upset what he had done.' (Emphasis added.)"

Under the above interpretations of Canon 36 and the present state of the case law, Abramson must be disqualified as an attorney in this matter.

Defendant, in its counter motion, has requested an order restraining and enjoining Abramson and "his agents, servants, employees and attorneys, and all persons in active concert or participating with him" from:

(a) participating further as counsel in this case;

(b) using evidence, knowledge or information examined or obtained by Abramson in connection with this and any other litigation; and

(c) commencing any action against defendant Bank in the United States District Court in Chicago, Illinois.

As to (a) above, the court does not feel it has authority, nor is the court inclined, to enjoin or remove other attorneys for the Receiver from continuing so to serve in this or any other case.

As to (b) above, there is no showing that plaintiff intends to use anything but documents, testimony and information that have become public by virtue of inclusion in the aforesaid 13 week criminal trial at Bismarck plus any documents and information that could normally be discovered from defendant or others by discovery proceedings under Rules 26 through 37 of the Federal Rules of Civil Procedure. The court therefore does not suppress or deem "tainted" or "immunized" any of plaintiff's intended proof at the trial even

though such may have been "examined or obtained" by Abramson.

Relative to (c) above, the Receiver certainly is free to commence any action it desires, and such is not being enjoined by this court. The court does not wish in any way to prohibit the Receiver from continuing this lawsuit nor endeavor to thwart his prosecution of any other lawsuit in any fashion, except for the disqualification of Abramson. Again, the court by this decision does not impugn in any way Mr. Abramson's character or integrity.

A separate order has been entered herein in accordance with the views expressed in this opinion.

## APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-65 Civ. 309

Allied Realty of St. Paul, Inc.,

Plaintiff,

vs.

Exchange National Bank of Chicago, Gertrude Brown, Phillip Kitzer, Sr. and Helen Kitzer, his wife, and Phillip C. Kitzer and Helen Kitzer, his wife,

Defendants.

### ORDER

The above-entitled matter came on for hearing before the undersigned, a judge of this court, at St. Paul, Minnesota, on March 25, 1968, on the motion of the plaintiff, Allied Realty of St. Paul, Inc., for an order declaring (1) that its attorney, Sidney P. Abramson, "has been guilty of no unprofessional or unethical conduct" in representing the plaintiff; (2) that Sidney P. Abramson may act according to an order issued by a Ramsey County district court appointing him as counsel for the plaintiff; and (3) that the Receiver for the plaintiff is not in any manner prejudiced or otherwise disabled from prosecuting the above-entitled matter against the defendant herein. Defendant, Exchange National Bank of Chicago, moved the court for an order (1) declaring that

Sidney P. Abramson acted and is acting in violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association; (2) restraining and disqualifying Abramson, his agents, servants, employees, associates and all persons in privy with him and others from (a) acting as counsel in any action against the Exchange National Bank involving claims raised as subject matter in a prior official United States Government investigation and prosecution; (b) using information, documents or knowledge learned, examined or obtained by Abramson as an Assistant or Special Assistant United States District Attorney; and (c) filing a lawsuit styled "draft complaint" attached as Exhibit D to a complaint in *Exchange National Bank of Chicago v. Sidney P. Abramson,* No. 3-68 Civ. 24 (D. Minn.), involving allegations in said complaint and prepared by or with the assistance of Abramson; and (3) expunging the complaint in this action as amended November 24, 1967. Appearing for the plaintiff in support of the motion were Briggs & Morgan by David Forsberg, First National Bank Building, St. Paul, Minnesota together with Sidney P. Abramson, Esqs., 1001 Degree of Honor Bldg., St. Paul, Minnesota. Appearances for the defendant were by Best, Flanagan, Lewis, Simonet & Bellows by Harold Evarts, Esq., 1200 First National Bank Bldg., Minneapolis, Minnesota; D'Ancona, Pflaum, Wyatt & Riskind by Edgar Bernhard, Esq., 33 North LaSalle Street, Chicago, Illinois; Raskin, Downing & Dammann by Merrill A. Freed, Esq., [sic] 105 South LaSalle Street, Chicago, Illinois. The parties stipulated into the record that the evidence upon which the court may base its findings includes all of the records, files, exhibits and evidence in a certain proceeding related to the issues herein which was brought before this court in a case entitled *Exchange National Bank of Chicago v. Sidney P. Abramson,* No. 3-68 Civ. 24 (D. Minn.).

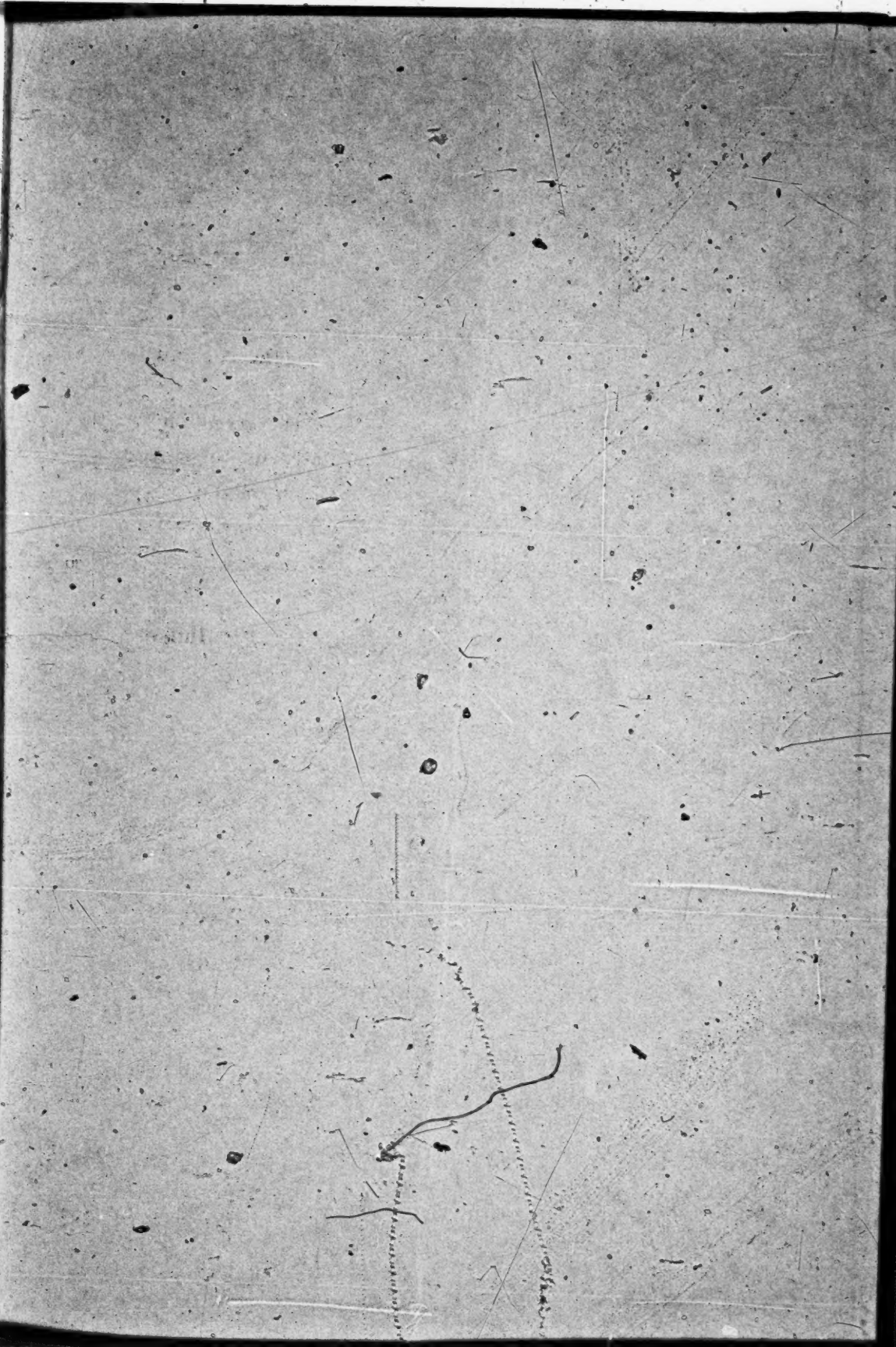
The court has examined the pleadings, motion papers, accompanying affidavits and testimony properly before it, and has read and examined the briefs submitted by the respective parties. On the basis thereof, and on the basis of all of the files, records and proceedings herein,

IT IS ORDERED That the motion of the plaintiff be, and the same hereby is denied as to parts (1) and (2) thereof and granted as to part (3) thereof.

IT IS FURTHER ORDERED That the motion of the defendant Bank is granted as to part (1) thereof, denied as to part (2) thereof except that the same is granted as to Sidney P. Abramson individually, and denied as to part (3) thereof.

Dated: April 11, 1968.

/s/ PHILIP NEVILLE
United States District Judge



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In The

# Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 149

ALLIED REALTY OF ST. PAUL, INC.,
*Plaintiff,*

vs.

EXCHANGE NATIONAL BANK OF CHICAGO, ET AL.,
*Respondents,*

SIDNEY P. ABRAMSON,
*Petitioner.*

## BRIEF OF EXCHANGE NATIONAL BANK OF CHICAGO IN OPPOSITION TO PETITION OF SIDNEY P. ABRAMSON FOR CERTIORARI

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In The

# Supreme Court of the United States

October Term, 1968

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No. 1431

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ALLIED REALTY OF ST. PAUL, INC.,

*Plaintiff,*

vs.

EXCHANGE NATIONAL BANK OF CHICAGO, ET AL.,

*Respondents,*

SIDNEY P. ABRAMSON,

*Petitioner.*

---

## BRIEF OF EXCHANGE NATIONAL BANK OF CHICAGO IN OPPOSITION TO PETITION OF SIDNEY P. ABRAMSON FOR CERTIORARI

---

Respondent, Exchange National Bank of Chicago, files this brief in opposition to the petition for certiorari heretofore filed by Sidney P. Abramson, petitioner herein.

### QUESTION PRESENTED

Whether petitioner, a lawyer having been in the public employ as Assistant and Special Assistant United States Attorney, was properly disqualified after his retirement from accepting employment as an attorney in connection with matters which he investigated and passed upon while in such public employ.

## STATEMENT OF THE CASE

Petitioner has made a statement of the case which is acceptable to respondent for purposes of this brief, except for four corrections:

First, petitioner correctly states that respondent was not a defendant in the criminal prosecution. What petitioner fails to state, however, is that three former employees of respondent were among the defendants in the criminal case in which petitioner actively participated as government attorney. (Charges against these former employees were subsequently dismissed.) Moreover, several of the defendants in the case at bar, other than respondent, were tried and acquitted in the same criminal case.

Second, petitioner in this case did not represent the State Court Receiver. Petitioner represented Allied Realty of St. Paul, Inc. The State Court Receiver is not a party in this proceeding.

Third, the motion of Allied Realty of St. Paul, Inc., to find the petitioner not guilty of unethical conduct was filed on February 28, 1968, rather than on May 11 as petitioner erroneously states on page 4 of his petition. On March 10, 1968, respondent filed its motion to disqualify petitioner and for other relief. Petitioner was disqualified by order of the United States District Court for the District of Minnesota on April 11, 1968. (238 F. Supp. 464)

Fourth, petitioner correctly states at page 3 of his petition that he participated in the criminal trial from March to June, 1967, and that on November 21, 1967, the Receiver (Mr. Homer A. Bonhiver) petitioned for the appointment of petitioner as attorney. In addition, it should be pointed out that "perhaps towards the end of the trial" though "it might have been even after the termination of the trial" Bonhiver told petitioner "It would be awfully nice of we could use you because of your background in this thing" (R. 58-59); and

that in August of 1967 petitioner had already "begun to act for Mr. Bonhiver" (R. 59). Very little time, if any, elapsed between the criminal trial and the Receiver's approaches to petitioner for his services because of his "background in this thing."

## ARGUMENT

The sole contention made by petitioner in support of his petition for certiorari is that the courts below were incorrect in holding that petitioner's conduct was in violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association.

Not only is such a contention insufficient to justify certiorari, but the contention itself is belied by the record. The courts below were clearly correct in holding that petitioner's conduct was in violation of Canon 36.

Canon 36 provides:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Petitioner is candid enough to admit, at page 2 of his petition, that "some facts and evidence are common to the criminal prosecution" in which he participated actively as government counsel and the instant civil action in which he has been disqualified under Canon 36. Moreover, as the District Judge pointed out in his opinion below, petitioner had access to F.B.I. and postal inspectors' reports, the grand jury minutes and all grand jury and government exhibits. (Petition for cert., p. B-5.)

The very reason for the attempted employment of petitioner subsequent to his government service was the advantage that would result to his new client by virtue of peti-

tioner's extensive knowledge and background in respect to matters particularly relative to respondent as a result of petitioner's participation as government attorney in the criminal trial. (Petition for cert., p. B-6.)

It is apparent, therefore, that petitioner's activities after leaving public employ were precisely and exactly the types of involvement which Canon 36 was designed to prevent.

Petitioner cites no authorities to support his sweeping claim (at page 6 of his petition) that the ruling below represents a departure "from previous decisions relating to the former government attorney." To the contrary, the case of *Hilo Metals Co. v. Learner Co.*, 258 F. Supp. 23 (D. Haw. 1966), one of only two cases cited by petitioner, was relied on by the courts below to support the holding that petitioner was in violation of Canon 36.

In the only other case cited by petitioner, *United States v. Standard Oil Company,* 136 F. Supp. 345, 364, 365 (S.D. N.Y. 1955), the ruling against disqualification was based on the fact that the former government attorney "did not actually come into contact with materials substantially related to the controversy at hand," and that the attorney's work "was unrelated to the instant controversy." In the case at bar, petitioner came into contact with materials directly related to the controversy at hand, and petitioner's work was admittedly related to the instant controversy. Petitioner's disqualification under Canon 36 was therefore inescapable.

Petitioner's witness Hyam Segell did not testify, as suggested by petitioner at page 8 of his petition, that there was no violation by petitioner of Canon 36. The witness gave most guarded answers when asked what his opinion was as to whether a lengthy hypothetical case constituted a violation of Canon 36. He answered that he would first have to try to refresh his recollection as to Canons 36 and 37; that

he believed that Canon 36 "is the conflict of interest Canon" (which, of course, it is not) and that he did not recall Canon 37 "unless I have those reversed." He was then handed Canon 36, and at his request he then also examined Canon 37; and then (after a long and uncomfortable pause, which of course is not reflected in the record) he was able to give the following vague answer for what it may be worth: "My opinion is that it is not a violation of the two Canons when read in combination." (See petition for cert., p. E-12.)

Finally, as to the article by Judge Kaufman, "The Former Government Attorney and the Canons of Professional Ethics," 70 Harv. L. Rev. 657, 666 (1957), Judge Kaufman makes it clear that his concern is how far knowledge should be imputed to lawyers in a large government agency "in the absence of proof of actual knowledge." In the instant case, there is abundant proof of petitioner's actual knowledge of, and direct participation in, the very matters in which he subsequently gained private employment.

## CONCLUSION

For all the foregoing reasons, respondent asks that the petition for certiorari of Sidney P. Abramson be denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 208

EXCHANGE NATIONAL BANK OF CHICAGO,
*Cross-Petitioner,*

vs.

SIDNEY P. ABRAMSON, ALLIED REALTY OF ST. PAUL, INC., GERTRUDE BROWN, PHILLIP KITZER, SR. and HELEN KITZER, his wife, PHILLIP C. KITZER and HELEN KITZER, his wife,
*Respondents.*

## BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

# Supreme Court of the United States

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No. 1493

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*Cross-Petitioner,*

vs.

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*Respondents.*

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## BRIEF IN OPPOSITION TO CROSS-PETITION OF EXCHANGE NATIONAL BANK FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent Allied Realty of St. Paul, Inc. (hereinafter "Allied Realty") respectfully opposes the cross-petition of Exchange National Bank of Chicago (hereinafter "Bank") for the issuance of a writ of certiorari to review certain portions of the judgment of the United States Court of Appeals for the Eighth Circuit entered March 26, 1969.

## QUESTION PRESENTED

Where an attorney is enjoined from participating in private litigation because he is found to be in violation of Canon 36:

1. does all information he learned about, examined or obtained in the course of his public employment become *ipso factor* suppressed in the private litigation;

2. may other attorneys who are not partners or associates of his, or in concert with him and who are not within the scope of Canon 36 be disqualified from participating in the private litigation by application of Rule 65(d) of the Federal Rules of Civil Procedure.

## STATEMENT OF THE CASE

Respondent Allied Realty deems it necessary to supplement the statement of the case supplied by the Bank, because the Bank's statement does not fully present the facts relevant to its cross-petition.

### 1. Nature of the Judgment of which Review is Sought.

This action was commenced in the District Court of Ramsey County, Minnesota on September 17, 1965 and thereafter removed to the United States District Court, District of Minnesota, where it is now awaiting trial (R. 37-38). The purpose of the suit is to nullify a mortgage held by the Bank on premises owned by Allied Realty on the grounds that the Bank paid the proceeds of the mortgage to the principals of Allied Realty personally, and that they, with the Bank's knowledge, used said proceeds for their own benefit. In November of 1967,

Sidney P. Abramson was added as additional counsel for Allied Realty (R. 38).

The Bank moved the district court for an order declaring Sidney P. Abramson to be in violation of Canon 36, and also for an order "restraining, enjoining and disqualifying Abramson, his agents, servants, employees, and attorneys, and all persons in active concert or participating with him, or with them," from:

(a) participating further as counsel in this case or in any case involving claims against the Bank connected with the Kitzers;

(b) using evidence, knowledge or information "learned about, examined or obtained by Abramson in the course of his former official position";

(c) commencing any action or proceeding against the Bank by filing the draft complaint attached as Exhibit D to the Bank's complaint in the matter of *Exchange National Bank of Chicago v. Sidney P. Abramson*, File No. 3-68-Civil 24, or any other complaint involving any of the same matters alleged in said draft complaint and prepared by or with the assistance of Abramson (R. 25-27).

The Bank also moved for an order expunging from the files in these proceedings the amended complaint filed on November 24, 1967 (R. 27).

The district court by order dated April 11, 1968 found Abramson to be in violation of Canon 36. With respect to (a), (b) and (c) above, the district court denied the Bank's motion except insofar as it related to Sidney Abramson. As to (a), the court in its memorandum accompanying its order said that it was not authorized nor inclined to remove other attorneys for the receiver from continuing to serve in this or any other

case; as to (b), the court said there is no showing that Allied Realty intends to use anything but documents or information which are either public or otherwise discoverable; and as to (c), the court said that it did not wish in any way to prohibit or thwart the receiver's prosecution of this or any other lawsuit (R. 111-112). The court denied without comment the Bank's motion for an order expunging from the files in these proceedings the amended complaint filed on November 24, 1967.

The Court of Appeals for the Eighth Circuit affirmed the lower court's denial of the motion, and the Bank now seeks review by certiorari of this portion of the judgment.

## 2. Facts.

The complaint in this action was prepared and served by the law firm of Briggs and Morgan, general counsel for the receiver of American Allied Insurance Company. Allied Realty is a wholly owned subsidiary of American Allied. Mr. Abramson did not participate in any way in the action until November 1967, (R. 38), over two years after the commencement of the action.

There was at the commencement of the litigation ample information and documentation available to Allied Realty supporting the allegations of the complaint. In the summer of 1965 there was a trial in the District Court of Ramsey County entitled *Cyrus E. Magnusson as Commissioner of the State of Minnesota v. American Allied Insurance Company*, File No. 341749, as a result of which American Allied was declared insolvent and placed in receivership. The receiver had access to the transcript and the exhibits of that trial (R. 38). In addi-

tion, he had available to him all of the books and records of American Allied and its affiliated corporations (R. 37).

After commencement of this action the receiver sat through the criminal trial in Bismarck, North Dakota, in the spring of 1967, testified in said trial, heard the testimony of the witnesses and examined many of the exhibits offered in evidence by the parties to said proceedings, and obtained a copy of the transcript and the exhibits (R. 39). Furthermore, interrogatories have been served by Allied Realty upon the Bank, and answers have been received describing documents, attaching copies of said documents to the answers and giving names and dates pertinent to the litigation (R. 39). Additional discovery will be taken in the future. It is apparent that Allied Realty does not and never has relied on Mr. Abramson as a source of information in this suit, nor on any supposedly "secret" or "confidential" evidence to establish its case against the Bank.

The Bank does not claim, and the record does not support any claim, that any person acting for Allied Realty is an agent, servant, or employee of Mr. Abramson. None of the attorneys representing Allied Realty in this case are partners or associates of Mr. Abramson. Mr. Abramson will not directly or indirectly derive any financial benefit out of the fees paid by Allied Realty in connection with this action. The district court noted in its memorandum accompanying the order disqualifying Abramson that the breach of Canon 36 which it found to have taken place was inadvertent on the part of Mr. Abramson, and stated that by its decision it did not impugn in any way Mr. Abramson's character or integrity (R. 103-04).

## ARGUMENT

### Canon 36 Does Not Authorize the Disqualification of Persons Other Than Abramson Nor the Suppression of Evidence Nor the Prohibition of the Institution of Any Law Suit.

The district court disqualified Mr. Abramson's further participation in this case on the basis of Canon 36 which provides in pertinent part:

> A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such employ or office.

The canon operates against specific conduct of an attorney: namely, the acceptance of employment after his retirement from public office. The canon's purpose is to regulate a lawyer's conduct; it contains not a single word that in any way suggests that it is intended to disqualify or suppress any information or material. This is in contradistinction to Canons 6 and 37 (not involved here) which expressly forbid the divulgence of secrets or confidences and impose upon the attorney the duty to preserve such confidences.

Neither is there any language in the Canon which would permit a court to use it to disqualify an attorney other than one who had previously held public office. The Court of Appeals said in its opinion below:

> As previously pointed out, this action was commenced prior to Mr. Abramson's appointment by other attorneys representing the plaintiff. We find nothing in the plain

language of Canon 36 which would indicate that it is designed under ordinary circumstances such as here to reach beyond the attorney who previously held public office. The purpose of the Code of Ethics is to prescribe standards of conduct for attorneys. Such purpose with respect to Canon 36 is served by the disqualification of Mr. Abramson. The canon makes no provision either directly or by fair implication for abridging any right of the plaintiff or any other attorney who does not share fees with the disqualified attorney. The Code of Ethics applies generally to attorneys, not to litigants. Absent a fee sharing arrangement with the former public official, neither the plain words nor the policy underlying the canon requires that unrelated attorneys be barred from their right to represent the plaintiff.

The Bank is trying to convert the canon into a tactical device for private litigants, and seeks by the use of this device to immunize itself from all attempts to assert claims against it arising out of or connected with the transactions involved in the criminal proceedings.

## Rule 65(d) Cannot Be Used To Extend the Scope of the Canon.

The Bank relies on Rule 65(d) of the Federal Rules of Civil Procedure as authority for the disqualification of attorneys other than Abramson and for the suppression of evidence. This reliance is misplaced. The Rule provides that every order granting an injunction,

> "is binding only upon the parties to the action, the officers, agents, servants, employees, and attorneys and

upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The injunction entered by the District Court prohibits Abramson from further participation in this case. If any party to the action or its officers, agents, servants, employees, or attorneys, or persons in concert with them, should aid or encourage Abramson to participate in this case, such persons would be in violation of the injunction and subject to the court's contempt powers by virtue of Rule 65(d). The Bank has twisted the meaning of the Rule and seeks to use it to disqualify attorneys other than Abramson from participating in the case and to prohibit the use of information by persons other than Abramson.

The purpose of Canon 36 is to prohibit an attorney from gaining financial advantage through the use of information which he obtained as a public official. This purpose is fully served by the disqualification of Abramson.

## The Bank Seeks An Advisory Opinion Relating to the Admissibility of Evidence Which Has Not Been Presented to the District Court Solely on the Basis that Abramson Learned About It, Examined It or Obtained It in the Course of His Official Position.

The Bank seeks to enjoin the use, disclosure or transmittal of any information "learned about, examined or obtained by Abramson in the course of his former position". The information in controversy is contained in the record of the criminal trial held in Bismarck, North Dakota, in the spring of 1967, in the transcript of the receivership trial held in Ramsey

County, Minnesota, in the summer of 1965, and in the various books and records of the American Allied receivership. These are all public records. If the Bank's motion were to prevail it would only have to prove that a particular item of evidence was learned about, examined or obtained by Abramson, and upon such proof the evidence would forthwith be suppressed. No doubt Abramson learned about a great deal of information in connection with his participation in the criminal proceedings. The suppression of all such information for the sole reason that Mr. Abramson happened to learn about it would certainly give a new twist to Canon 36: it would provide a windfall to the Bank in terms of its strategic position vis-a-vis Allied Realty, and would result in a trial in which the truth would never be disclosed, and any judgment entered would be based upon an incomplete understanding of the matters alleged in the complaint. In denying this portion of the motion, the district court said at R. 111 and 112:

> As to (b) above, there is no showing that plaintiff intends to use anything but documents, testimony and information that have become public by virtue of inclusion in the aforesaid 13 week criminal trial at Bismarck plus any documents and information that could normally be discovered from defendant or others by discovery proceedings under Rules 26 through 37 of the Federal Rules of Civil Procedure. The court therefore does not suppress or deem "tainted" or "immunized" any of plaintiff's intended proof at the trial even though such may have been "examined or obtained" by Abramson.

The Eighth Circuit, in its opinion, after pointing out that Canon 36 contains no prohibition against documents or information obtained while a public servant, said:

"The record in the case before us shows that the information in controversy appears in the record of the criminal trial and that the information is not confidential."

## The Authorities Cited by the Bank Are Not in Point.

The Bank relies on *United States v. Mahaney*, 27 F. Supp. 463 (1939). There, an attorney, while employed by the United States government, had access to confidential information relating to the Bank of America. Thereafter he was employed by the Bank of America, and while so employed he studied the charges and proceedings relating to the Bank of America. He was told by other counsel for the government, that his acceptance of employment with the Bank of America was unthinkable. The court disagreed with the contention that his employment was made in good faith and that the Bank of America was innocent of any impropriety. At the instance of the United States government, the court temporarily enjoined the defendants from using in the pending litigation by the government against the Bank of America the confidential information obtained by the attorney while employed with the government.

The *Mahaney* case involves an attorney who deliberately placed himself in a position adverse to his former client, the United States government, without the consent of the government and in face of its disapproval, and used confidential information which he had received while attorney for the government. Moreover, it was the United States government who sought the injunction. The case is wholly inapplicable to this case.

In its opinion the Court of Appeals for the Eighth Circuit said that the *Mahaney* case "affords no support for defendant's position".

In *Knoll Associates, Inc. v. Federal Trade Commission*, 397 F. 2d 530 (7th Cir. 1968), an order of the F.T.C. was set aside because it was based in part upon documents admittedly stolen from the petitioner and because the use thereof was an unreasonable search and seizure. It has no application to the instant case. *Knoll* did not involve a construction of any canon of ethics; it involved the determination of the admissibility of specific evidence which had been presented to the trier of fact; it did not involve the present situation where the information in controversy is contained in the transcripts and exhibits of cases tried in open court and available generally to the public.

## There Are No Grounds for the Issuance of a Writ of Certiorari in This Case.

Rule 19 of the Rules of the Supreme Court of the United States sets forth the considerations governing review by certiorari. The Bank has not alluded to Rule 19 nor attempted to show how its cross-petition comes within the scope of that Rule. There is no federal question of substance; no conflict between courts of appeal; and no important questions of state or federal law. For the most part, the questions presented are simply questions of evidence. If at trial Allied Realty seeks to offer any evidence which is inadmissible for any reason, the district court, having the evidence before it, can make an informed ruling. If its ruling is in error, there will be opportunity for appeal after trial.

## CONCLUSION

The Bank is asking the aid of this Court to either shield it from this litigation or, failing that, to help it suppress the truth about the allegations in the complaint. It has neither precedent nor reason for its position; it has not shown any facts which indicate that improper evidence might be used against it; it has shown no grounds for the issuance of a writ of certiorari. Justice requires that the Bank's cross petition be denied.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1968

No. [redacted] 208

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*Cross-Petitioner,*

vs.

SIDNEY P. ABRAMSON, ALLIED REALTY OF ST. PAUL, INC., GERTRUDE BROWN, PHILLIP KITZER, SR., and HELEN KITZER, his wife, PHILLIP C. KITZER and HELEN KITZER, his wife,
*Respondents.*

## REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR CERTIORARI

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---

## REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR CERTIORARI

---

This brief is filed by cross-petitioner, EXCHANGE NATIONAL BANK OF CHICAGO, in support of its cross-petition for certiorari, and in reply to the opposing brief of ALLIED REALTY OF ST. PAUL, INC. (hereinafter referred to as "respondent").

I.

Respondent argues that Canon 36 operates only against specific conduct of an attorney; "in contradistinction to Canons 6 and 37." (Respondent's brief, p. 6.)

We fail to see the claimed distinction. All of the Canons are directed to lawyers; all are intended to regulate the conduct of lawyers. The question for determination is whether there should be any hesitancy in going beyond the lawyer in order to dissipate the effects of the violation of a Canon.

In *United States v. Mahaney,* 27 F. Supp. 463 (1939) (discussed in our cross-petition at page 6), the Court granted an injunction to prevent the use of confidential information by a lawyer and also *by the client* who had engaged the services of the lawyer in violation of the Canons. The Court in *Mahaney* recognized that the Canons "are addressed to the conscience of every lawyer," but the Court issued an injunction against *both* the lawyer and his client in that case.

The *Mahaney* case involved violation of Canons 6, 36 and 37. All three Canons are directed to lawyers; none of the Canons contains express language authorizing an injunction against a non-lawyer. *Mahaney* is, therefore, clear authority in support of the Court's power to vindicate Canons of Ethics by relief that extends beyond the lawyer himself. Were the rule otherwise, would not the Canons be rendered almost meaningless?

II.

Respondent suggests that the full relief sought by cross-petitioner would "immunize" it from "all attempts to assert claims against it arising out of or connected with the transactions involved in the criminal proceedings"; would "provide a windfall" to cross-petitioner; and would "suppress the truth about the allegations in the complaint." (Respondent's brief, pp. 7, 9, 12.)

Such suggestions border on the preposterous. We clearly stated in our cross-petition (at pages 6-7) that we sought to disqualify only material handed on to others by a lawyer in violation of the Canon, but that the same material could be used if gained from an unprohibited source.

Respondent has represented to this Court (at page 5 of Respondent's brief) that respondent "does not and never has relied on Mr. Abramson as a source of information in this suit." If this be true, we fail to understand how the suppression of any evidence obtained by Abramson and handed on

by him can immunize cross-petitioner from claims or interfere with the search for truth.

What the broadened relief sought by cross-petitioner *would* do would be simply to prevent the use against cross-petitioner, by anyone, of any of the fruits of Abramson's conduct which violated Canon 36. Such additional relief is plainly warranted if Canon 36 is to remain meaningful and effective.

In this connection, perhaps the clearest example of the ineffectiveness of the limited order below is the Court's refusal to strike the amended complaint. The amended complaint was admittedly based on the information developed during the criminal trial in which Abramson served as assistant prosecutor. The Court of Appeals below actually stated that there was "no reasonable basis" for depriving respondent "of the *benefit* of any pleadings which Mr. Abramson may have prepared." (Cr.-Pet. 18; emphasis added.) Abramson obviously drew upon and selected from his background in the criminal case (he was, after all, retained for this very purpose by respondent); and the amended complaint was prepared by Abramson, signed by Abramson, offered to the Court by Abramson and filed by Abramson (R. 12, 33, 47-48; S.R. 21-22, 123-31). The amended complaint was thus prepared and filed in *clear* violation of Canon 36, and we see no reasonable basis for permitting respondent to enjoy the benefit of Abramson's violation of the Canon.

Is Abramson to be disqualified but his work product allowed to stand? Is respondent to be prevented from future employment of Abramson in continued violation of Canon 36, but allowed to enjoy the benefit of his past violations of the Canon?

The rule of law which respondent appears to be urging on this Court would run like this:

> If a lawyer violates Canon 36, he cannot continue to participate in the matter which constitutes his violation,

and his disqualification shall take effect from the moment when he gets caught. However, anything he does before he gets caught, anything he has successfully passed along to others, and any use he has made of his governmental position after his retirement therefrom, but before he was caught, shall be inviolate. Also, the law of agency—and the literal intendment of Rule 65 (d)—shall continue in effect in all matters, civil and criminal, except only in connection with the Canons of Ethics. Solely in that connection, shall the rule of law henceforth be that although a lawyer may not violate a Canon himself, he may deliver into other hands (even to other lawyers) the fruits of such violation. Such fruits are cleansed of any taint of violation of ethical principles or of law as soon as they reach others' hands —including information improperly gained by him, pleadings prohibited from being drafted by him, etc.

Such a rule of law should carry an additional *caveat* to any lawyer in government employ, to the effect that, upon retirement, he would be wise to deliver to others, as speedily as possible, all information, special knowledge, lists of documents, etc.—anything which he investigated or passed upon while in the public employ—since use thereof by him would be a violation of Canon 36 (when and after being caught, tried and found disqualified) whereas in other hands the use thereof is not only permissible but declared to have been restored to admissibility by having been handed over to someone else—anyone else.

Can it be seriously urged that such was the intent of those who proposed and those who adopted Canon 36? Of the Minnesota Supreme Court Justices who accepted it as a rule of law for Minnesota in 1955? Or of the American Bar Association which promulgated the Canon in the first place?

## CONCLUSION

Support of the Canons of Ethics is a matter of the utmost importance for both bench and bar.

We believe that this case—in which a Canon was violated but the relief granted was so narrow and limited as to undermine the Canon—is a highly appropriate one for review by this Court on writ of certiorari.

We respectfully request that the cross-petition for a writ of certiorari be granted.

Respectfully submitted,

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